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# AMERICAN STATE REPORTS.

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# **AMERICAN STATE REPORTS.**

**VOLUME 116.**

**(15)**



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**WISCONSIN.**

**WOODARD v. GERMAN-AMERICAN INSURANCE COMPANY.**

[128 Wis. 1, 106 N. W. 681.]

**INSURANCE, FIRE—Waiver of Forfeiture of Policy.**—If a fire insurance policy stipulates that, unless otherwise provided by agreement indorsed thereon or added thereto, it shall become void if foreclosure proceedings are commenced with the knowledge of the insured, a forfeiture thus incurred is not waived by the silence of the insurer after knowledge of the facts nor by its retention of proof of loss not invited by it, nor by its failure to tender back an unearned premium, although the insured was thereby induced to believe that the policy would be continued in force. (p. 19.)

**INSURANCE, FIRE—Waiver of Forfeiture by Agent.**—After the execution and forfeiture of a policy of fire insurance neither knowledge of the forfeiture coming to the agent who insured the policy, silence on his part, nor failure to return unearned premiums amounts to a waiver of the forfeiture in the absence of an agreement to that effect provided by the policy, indorsed thereon or added thereto. (pp. 19, 20.)

**INSURANCE, FIRE—Forfeiture—Rights of Mortgagee.**—If the cause of action on a fire insurance policy has been lost to the insurer through forfeiture of the policy, a mortgagee, for whose benefit the insurance was procured, has no greater right than the insured. (p. 20.)

**PRACTICE—Judgment Notwithstanding Verdict.**—If the findings of a special verdict in connection with the undisputed evidence will not sustain a judgment for the plaintiff, it is immaterial in rendering judgment for the defendant whether the verdict is set aside, or the answers therein changed. (p. 20.)

R. A. Cole, for the appellants.

J. Barnes and E. D. Minahan, for the respondent.

<sup>3</sup> KERWIN, J. It is undisputed that after the issuance of the policy an action to foreclose a mortgage owned by plaintiff Ulwelling upon the property insured was commenced without <sup>4</sup> the consent of the defendant and with the knowl-

edge of the insured, Woodard, and it is not seriously disputed but that the commencement of such action worked a forfeiture of the policy; but it is claimed on the part of the plaintiffs that such forfeiture was waived by defendant, and that by its acquiescence in the foreclosure proceedings, receipt of proofs of loss, and failure to return unearned premium it elected to treat the policy in force, and that such conduct on the part of the defendant after knowledge of the forfeiture amounted to a waiver or operated as an estoppel. The foreclosure action was commenced some ten days or more before the fire, and there is evidence tending to show that the agent of the company had knowledge of such action prior thereto. The plaintiffs made and served proofs of loss and commenced action to recover on the policy, claiming upon the trial, by way of establishing a waiver of the forfeiture occasioned by the foreclosure proceedings, that they had been put to trouble and expense in making proofs of loss and examining the remains of the destroyed building, without any objection on the part of the defendant, or assertion that it elected to stand upon the forfeiture of the policy, and that it retained the proofs of loss and did not return or offer to return the unearned premium, and that such conduct on its part amounted to a waiver of the forfeiture under the decisions of this court. But an examination of the cases cited by counsel for appellants will show that they do not sustain his contention. In *Gans v. St. Paul etc. Ins. Co.*, 43 Wis. 108, 28 Am. Rep. 535, *Cannon v. Home Ins. Co.*, 53 Wis. 585, 11 N. W. 11, and *Oshkosh G. L. Co. v. Germania F. Ins. Co.*, 71 Wis. 454, 5 Am. Rep. 233, 37 N. W. 819, the insured in each case was put to trouble and expense at the request of the company in the preparation and making of proofs of loss after the company had knowledge of the forfeiture; and in *Renier v. Dwelling-house Ins. Co.*, 74 Wis. 89, 42 N. W. 208, the general agent recognized the validity of the policy after forfeiture and invited proofs of loss, and <sup>5</sup> the insured furnished the same in pursuance of such invitation. In *Dick v. Equitable F. & M. Ins. Co.*, 92 Wis. 46, 65 N. W. 742, the insured was put to expense and delay by the company after knowledge of the forfeiture. In the latter case the insured at the request of the adjuster furnished a carpenter's estimate. There is no proof or finding in the case before us that the plaintiffs were put to any trouble or expense at the

request of the defendant. Nor is there any proof or finding establishing a waiver or estoppel. The undisputed evidence shows that defendant simply remained silent. It made no request and took no action inducing trouble or expense on the part of the plaintiffs. What the plaintiffs did, they did at their own volition and without any invitation from, or inducement by, defendant; they commenced action to recover, and defendant contested their right. The policy in suit contained the usual provision of standard policies to the effect that it should be void, unless otherwise provided by agreement indorsed thereon or added thereto, if, with the knowledge of the insured, foreclosure proceedings were commenced.

It being established that the policy was forfeited by the commencement of foreclosure proceedings, it only remains to consider whether such forfeiture has been waived. True, the jury found that the agent of the defendant by his silence and failure to tender back any portion of the premium, induced the plaintiff Woodard to believe that the policy would be continued in force notwithstanding the foreclosure proceedings, and that said plaintiff was induced to believe it was in force, and that he was put to the expense of filing proofs of loss. But these findings are wholly immaterial. The fact that Woodard believed the policy would be continued in force, or was induced to so believe by the silence of defendant or its failure to return the premium, cannot avail the plaintiffs. All that is claimed by plaintiffs is that defendant retained the proofs of loss and failed to return the unearned premium or notify plaintiffs that it claimed a forfeiture. It is undisputed that defendant was never asked to waive the forfeiture or return any part of the premium, and that it never requested plaintiffs to make proofs of loss or incur any expense whatever. Knowledge on the part of the agent is no evidence of waiver: *Hankins v. Rockford Ins. Co.*, 70 Wis. 1, 35 N. W. 34; *Carey v. German-Am. Ins. Co.*, 84 Wis. 80, 36 Am. St. Rep. 907, 54 N. W. 18, 20 L. R. A. 267; *Bourgeois v. Mutual F. Ins. Co.*, 86 Wis. 402, 57 N. W. 38. Under the standard policy respecting waiver otherwise than as provided in the policy, this court, in *Welch v. Fire Assn.*, 120 Wis. 456, 98 N. W. 227, said: "The court has never held, in the face of a policy provision forfeiting the contract for a violation of its provisions by the assured after the issuance thereof, such provision being accompanied by a stipulation that it shall

not be deemed waived other than by a writing indorsed thereon, that a waiver could take place in any other manner. The court has often held to the contrary."

In *Keith v. Royal Ins. Co.*, 117 Wis. 531, 94 N. W. 295, defense was made on the ground of forfeiture because of change of partners, and that the assured under the policy were not the unconditional owners, and it was shown for the purpose of avoiding the forfeiture that the agent was informed of such change and had knowledge of the facts before the fire; nevertheless it was held that such knowledge was immaterial, since no waiver was made in the manner provided by the policy. After execution of the policy, neither knowledge of the forfeiture coming to the agent, silent on his part, nor failure to return unearned premium amounts to a waiver in the absence of the agreement provided by the policy indorsed thereon or added thereto: *Stevens v. Queen Ins. Co.*, 81 Wis. 335, 29 Am. St. Rep. 905, 51 N. W. 555; *Bosworth v. Merchants' F. Ins. Co.*, 80 Wis. 393, 49 N. W. 750; *Straker v. Phenix Ins. Co.*, 101 Wis. 413, 77 N. W. 752; *Keith v. Royal Ins. Co.*, 117 Wis. 531, 94 N. W. 295. Nor does the retention of proofs of loss furnished by the insured <sup>7</sup> amount to a waiver: *McFetridge v. Phenix Ins. Co.*, 84 Wis. 200, 54 N. W. 326. The policy being forfeited by the foreclosure proceedings, and no sufficient waiver having been shown, the insured had no cause of action, and the mortgagee had no greater right than the insured: *Wunderlich v. Palatine F. Ins. Co.*, 104 Wis. 395, 80 N. W. 471; *Keith v. Royal Ins. Co.*, 117 Wis. 531, 94 N. W. 295. From what has been said it follows that it is unnecessary to consider the other grounds of forfeiture urged by the defendant.

It is further claimed on the part of the appellants that the defendant was not entitled to judgment notwithstanding the verdict, nor to judgment without setting aside the verdict or changing the answers therein. But it will be seen that the findings in the special verdict fail to establish a waiver of the forfeiture, and such findings in connection with the undisputed evidence would not sustain a judgment for plaintiffs. It was therefore wholly immaterial whether the verdict was set aside or the answers changed. The defendant, upon the undisputed evidence, was entitled to judgment.

By the COURT. Judgment affirmed.



*The Right of a Mortgagee to Whom a Policy of Insurance is made payable to recover for a loss, notwithstanding such conduct on the part of the mortgagor as would work a forfeiture as to him, is discussed in the note to Oakland H. I. Co. v. Bank of Commerce, 58 Am. St. Rep. 667. If a policy makes the loss payable to the mortgagee, and also provides that no violation of its conditions shall affect the mortgagee, the latter may recover to the extent of his interest, notwithstanding such violation: See Magoun v. Fireman's Fund Ins. Co., 86 Minn. 486, 91 Am. St. Rep. 370, and authorities cited in the cross-reference note thereto. But generally the right of a mortgagee to recover on a policy in favor of his mortgagor is dependent upon the inception and continuance of a valid contract of insurance between the insured and the insurer: Smith v. Union Ins. Co., 25 B. I. 260, 105 Am. St. Rep. 882.*

*The Effect of Foreclosure Proceedings as Avoiding the Insurance on the mortgaged property is considered in Stenzel v. Philadelphia Fire Ins. Co., 110 La. 1019, 98 Am. St. Rep. 481, and cases cited in the cross-reference note thereto; Findlay v. Union Mut. Fire Ins. Co., 74 Vt. 212, 93 Am. St. Rep. 885, and cases cited in the cross-reference note thereto.*

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## STATE v. MILWAUKEE MEDICAL COLLEGE.

[128 Wis. 7, 106 N. W. 116.]

**MANDAMUS Against Corporations—Enforcement of Contract.** Mandamus will not lie to compel a private corporation to perform its contract with an individual. The remedy in such case is either for damages for breach of the contract or to compel its specific performance. (pp. 23, 24.)

Fieburg & Killilea, for the appellants.

T. Kronshage, Jr., and Timlin & Glicksman, for the respondent.

<sup>12</sup> **KERWIN, J.** It appears from the record that the ground of petitioner's action is that he contracted with appellant, Milwaukee Medical College, for a course in the dental department of its college, and completed the prescribed course, paid the required fees, and performed all the conditions of the contract on his part to be performed, and under the terms of his contract with the appellant and the performance thereof he became entitled to a diploma, and that the appellant refused to deliver the same to petitioner. The case made is clearly one of breach of contract, and the question arises whether mandamus will lie to compel a private corporation to perform its contract. This question was not discussed by counsel in their briefs or upon oral argument, so we are

without the valuable aid which investigation and discussion by counsel would afford. Mandamus is a remedy only to be applied in extraordinary cases where there is no other adequate remedy. Where the applicant has an adequate remedy by action the writ will not be awarded: *State v. Kellogg*, 95 Wis. 672, 70 N. W. 300; *Clarke v. Hill*, 132 Mich. 434, 93 N. W. 1044; *King v. London A. Co.*, 1 Dowl. & R. 510; *Wood on Mandamus*, 1; *Shortt on Mandamus*, 233. It is granted usually for public purposes to compel the performance of a public duty imposed by law. It has been said that: "It is used only in extraordinary cases, and where the usual and ordinary modes of proceeding and forms of remedy are powerless to afford redress to the party aggrieved, and where without its aid there would be a failure of justice": *High on Extraordinary Legal Remedies*, 3d ed., sec. 5. The writ of mandamus lies to compel the performance of a public duty prescribed by statute, and to keep subordinate and inferior bodies and <sup>13</sup> tribunals exercising public functions within their jurisdiction, and to compel in proper cases the performance of specific duties imposed by law: *State v. Janesville St. R. Co.*, 87 Wis. 72, 41 Am. St. Rep. 23, 57 N. W. 970, 22 L. R. A. 759; *State v. Kellogg*, 95 Wis. 672, 70 N. W. 300; *State v. Polk Co.*, 88 Wis. 355, 60 N. W. 266; *State v. Milwaukee C. of C.*, 47 Wis. 670, 3 N. W. 760; *State v. Wisconsin C. R. Co.*, 123 Wis. 551, 102 N. W. 16; *State v. Bergenthal*, 72 Wis. 314, 39 N. W. 566; *State v. Johnson*, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33; *State v. Chittenden*, 112 Wis. 569, 88 N. W. 587; *Kennedy v. Board of Education*, 82 Cal. 483, 22 Pac. 1042; *People v. Nash*, 47 Hun, 542; *Shortt on Mandamus*, 228; *Wood on Mandamus*, 5; *High on Extraordinary Legal Remedies*, 3d ed., sec. 320f.

It seems, however, to be well settled that duties imposed upon corporations, not by virtue of express law or by the conditions of their charters, but arising out of contract relations, will not be enforced by mandamus. The authorities in England and this country appear to be quite uniform to this effect: *King and Wheeler*, Cas. temp. Hardw. 99; *Ex parte Robins*, 7 Dowl. Pr. 566; *King v. Mayor*, 2 Term Rep. 259; *King v. Bank of England*, 2 Barn. & Ald. 620; *Queen v. Orton*, 14 Q. B. 139; *Benson v. Paull*, 6 El. & Bl. 273; *High on Extraordinary Legal Remedies*, 3d ed., secs. 25, 321; *People v. Nash*, 47 Hun, 542; *State v. Republican R. B. Co.*, 20

Kan. 404; *People v. Dulaney*, 96 Ill. 503; *Tobey v. Hakes*, 54 Conn. 274, 1 Am. St. Rep. 114, 7 Atl. 551; *State v. Trustees*, 114 Ind. 389, 16 N. E. 808; *State v. Paterson etc. R. Co.*, 43 N. J. L. 505; *State v. Einstein*, 46 N. J. L. 479; *State v. New Orleans etc. R. Co.*, 42 La. Ann. 138, 7 South. 226; *Shortt on Mandamus*, 231; *Merrill on Mandamus*, sec. 16; *State v. Zanesville & M. T. Co.*, 16 Ohio St. 308; *State v. County Court*, 39 Mo. <sup>14</sup> 375; *Storer Post No. 1 v. Page*, 70 N. H. 280, 47 Atl. 246; *People v. Trustees*, 21 Hun, 184. In *High on Extraordinary Legal Remedies*, third edition, section 25, in speaking of mandamus it is said: "It is not, therefore, an appropriate remedy for the enforcement of contract rights of a private or personal nature; and obligations which rest wholly upon contract, and which involve no question of trust or of official duty, cannot be enforced by mandamus. A contrary doctrine would necessarily have the effect of substituting the writ of mandamus in place of a decree for specific performance, and the courts have, therefore, steadily refused to extend the jurisdiction into the domain of contract rights."

From the foregoing cases and many others which might be cited it seems clear that mandamus will not lie to compel a private corporation to perform its contract with an individual. In *State v. Trustees*, 114 Ind. 389, 16 N. E. 808, the court said: "Duties imposed on a corporation, not by virtue of express law, nor by the conditions of its charter, but arising wholly out of contract relations, will not be enforced by mandamus, since the use of such writ is limited to the enforcement of obligations imposed by law. Where the duties of a corporation, or of its trustees, grow out of or result from matters of contracts, writs of mandate will not lie against the corporation or its trustees, either in their corporate capacity or as individuals, to compel the performance of the contract, but the party aggrieved will be left to the ordinary remedies, either at law or in equity."

In the case before us the liability of the appellant college rested solely on contract between it and the petitioner. If the petitioner was entitled to his diploma and an action for damages was not adequate, he could compel specific performance. This was an adequate remedy: *Clarke v. Hill*, 132 Mich. 434, 93 N. W. 1044; *State v. Paterson etc. R. Co.*, 43 N. J. L. 505; *King v. London A. Co.*, 1 Dowl. & R. 510; *Tobey v. Hakes*, 54 Conn. 274, 1 Am. St. Rep. 114, 7 Atl. 551; *People*

<sup>15</sup> v. Trustees, 21 Hun, 184. If mandamus will issue to enforce the performance of the contract between petitioner and appellant, no reason is perceived why it will not lie in any case by a person to enforce a contract with a private corporation. It is very clear that the writ of mandamus, either in England or in this country, was never designed for such purpose. It follows from the undisputed facts that the petitioner was not entitled to a writ of mandamus, and therefore the judgment must be reversed and the writ quashed.

By the COURT. The judgment below is reversed and the writ quashed.

Upon a motion for a rehearing counsel for respondent contended, inter alia, that the decision in this case is inconsistent with the decisions in *Oconto City W. S. Co. v. Oconto*, 105 Wis. 76, 80 N. W. 1117, and *State v. Chicago etc. R. Co.*, 79 Wis. 259, 48 N. W. 243, 12 L. R. A. 180. The existence of an equitable remedy is not a sufficient answer to an application for madamus. There must be an adequate specific legal remedy: *Harcastle v. Maryland etc. R. Co.*, 32 Md. 32; *People v. State Treasurer*, 24 Mich. 468; *Commonwealth v. Allegheny Co. Commrs.*, 32 Pa. 218; *People v. Mayor*, 10 Wend. 393; *State v. Sneed*, 105 Tenn. 711, 58 S. W. 1070; *Slemmons v. Thompson*, 23 Or. 215, 31 Pac. 514; *Durham v. Monumental S. M. Co.*, 9 Or. 41. The relator's right did not rest wholly in contract. The diploma would entitle him (under section 1410h, Statutes of 1898) to a license to practice dentistry. The fact that the corporation is a private corporation, so called, has never been considered any defense to the writ of mandamus if such private corporation is authorized to issue a certificate which confers a certain status or franchise upon its recipient: *People v. Medical Society*, 32 N. Y. 187; *Board of Education v. State*, 100 Wis. 455, 76 N. W. 351; *State v. Chamber of Commerce*, 20 Wis. 63; *State* <sup>16</sup> v. *Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760; *Jackson v. State*, 57 Neb. 183, 77 N. W. 662, 42 L. R. A. 792; *People v. Bellevue Hosp. Med. College*, 14 N. Y. Supp. 490, affirmed 128 N. Y. 621, 28 N. E. 253. A right resting in contract cannot, as a general thing, be enforced by mandamus; but where the contract gave the relator the right to come within the class entitled to enforce the performance of a legal duty, and that legal duty determines the status or is of the nature of a privilege, it can be no objection to enforcing such duty that the

relator brought himself within the class of persons entitled to enforce it by making a contract: *Whalen v. La Crosse*, 16 Wis. 271; *State v. Jennings*, 48 Wis. 549, 4 N. W. 641; *State v. Winn*, 19 Wis. 304, 88 Am. Dec. 689; *State v. Warner*, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255; *People v. Goss & P. Mfg. Co.*, 99 Ill. 355; *State v. First Nat. Bank*, 89 Ind. 302; *Hair v. Burnell*, 106 Fed. 280; *State v. Supreme Lodge (N. J.)*, 50 Atl. 581; *American W. W. Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 610, 64 N. W. 611, 30 L. R. A. 447; *Richmond R. & E. Co. v. Brown*, 97 Va. 26, 32 S. E. 775. In any event, the case should not be thrown out of this court on the court's own motion upon a mere question of practice not involving the jurisdiction of the court, after the case was submitted on its merits and without objection of this kind: *Buffington v. Bardon*, 80 Wis. 635, 50 N. W. 776; *Creager v. Wright School Dist.*, 62 Mich. 101, 28 N. W. 794; *State v. Moss*, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373; *Jessup v. Carey*, 61 Ind. 584; *State v. Smith*, 11 Wis. 65; *State v. Kellogg*, 95 Wis. 672, 70 N. W. 300; *Fuller v. Trustees*, 6 Conn. 532.

The motion was denied April 17, 1906.

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*Mandamus does not Lie to Enforce the fulfillment of a mere contractual obligation: New Orleans Auxiliary Sanitary Assn. in Liquidation*, 105 La. 172, 83 Am. St. Rep. 230; *State v. Associated Press*, 159 Mo. 410, 81 Am. St. Rep. 368; *Florida etc. R. R. Co. v. State*, 31 Fla. 482, 34 Am. St. Rep. 30; *Miller v. State Board of Agriculture*, 46 W. Va. 192, 76 Am. St. Rep. 811.

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## WHITMAN v. MILWAUKEE FIRE INSURANCE COMPANY.

[128 Wis. 124, 107 N. W. 291.]

**INSURANCE, FIRE—Contract for.**—It is essential to a valid contract of insurance that the time of the commencement of the risk be agreed upon. (p. 26.)

**INSURANCE, FIRE—Contract for.**—An application to an insurance company for a policy of fire insurance and a promise by its agent to attend in due time to the matter of taking such further steps as were necessary to effect the insurance, subject to the action of the insurer, do not constitute a valid contract for insurance in praesenti. (p. 26.)

**INSURANCE, FIRE—Oral Contract for.**—A valid contract for fire insurance may be made orally, but it requires a meeting of the minds of the parties as to all of the essential provisions. (p. 27.)

Morris, Riley & Dudgeon, for the appellant.

Olin & Butler, for the respondent.

<sup>129</sup> MARSHALL, J. It is considered the determination of the court below, as to there being an entire absence of evidence warranting the jury in reasonably coming to the conclusion that a contract of insurance was made between respondent and the Laufenberg, cannot be disturbed. It is absolutely essential to any contract that the minds of the persons representing the two sides of the matter shall consentiently meet upon the major proposition constituting the same; upon a particular result to be accomplished, involving mutual obligations for future performance, or a consideration moving in praesenti from one to the other as an equivalent for something later to be rendered by such other or some person to the former or some one. Contracts of insurance form no exception to this. One of the prime essentials of such a contract is the time of the commencement of the risk. We fail to find any proof that such element was agreed upon in the instance under consideration. It was not even mentioned. One of the Laufenbergs testified at one time during the trial that the agent promised that the insurance should take effect at noon on the day the application was made, but he later admitted that such was not the fact; that a remark of that kind was made to him by the agent on a former occasion of insuring the property, but that on the one in question nothing whatever on the subject was said. So the want of evidence on that point in appellant's favor, with the evidence against him, shows most conclusively that no contract in praesenti was thought of at the time the application was made. The real transaction, according to the testimony of Laufenberg, was an agreement that the agent would attend, in due time, to the matter of taking such further steps as were necessary to effect the insurance, subject to the action of the respondent. No money was paid. The only assurance given by the agent, as said by Laufenberg, was that the former "would see to it, take care of it so it would be all right," would "get a policy." That is consistent only with the idea that the only contract of <sup>130</sup> insurance in contemplation was one to be evidenced by a policy issued in the usual way.

As indicated in *Taylor v. Phoenix Ins. Co.*, 47 Wis. 365, 2 N. W. 559, 3 N. W. 584, the presumption arising from the ordinary transaction of making a written application for insurance is that the actors in the transaction had in mind a contract to be closed at some subsequent time. The first step is not supposed to involve binding contractual relations; it suggests only future probabilities in that regard. To displace that, by establishing, as a fact, that something out of the ordinary was contemplated: the actual closing of a contract, precedent to the issuance of a policy in the ordinary way such contracts are made, pretty clear evidence is required showing that the minds of the parties met on that precise proposition. Evidence that the circumstances characterizing an application were closed by a mere promise on the part of the agent to attend to the matter of obtaining a policy of insurance is, as suggested in the case cited, proof that no contract of insurance was supposed to be closed in *praesenti*.

We need not continue the discussion. The principle involved is pretty fully illustrated in *Wood v. Prussian Nat. Ins. Co.*, 99 Wis. 497, 75 N. W. 173, and the early case of *Strohn v. Hartford F. Ins. Co.*, 37 Wis. 625, 19 Am. Rep. 777. In the first case cited it was said that an oral contract of insurance, like any other, requires a meeting of minds as to all of the essential provisions, leaving nothing to be done but to execute it. The evidence required to show such meeting of minds, when the nature of the contract is of such an extraordinary character as that of an oral one of insurance, must necessarily be pretty definite. It takes evidence sufficient to satisfy the mind to a reasonable certainty to establish in a court of justice the affirmative as to any matter in dispute. When such affirmative is to the effect that an occurrence of an extraordinary character has taken place, circumstances which ordinarily characterize a common transaction of a particular sort <sup>131</sup> must necessarily be supplemented by other circumstances of considerable weight, to show that a radically different transaction was in the minds of both parties in the particular instance. There are no such circumstances here. Rather, there is positive evidence, and circumstances as well, confirmatory of the idea that the *Lauenbergs* simply made an application for a policy of insurance.

It has been doubted by some writers as to whether an action can be legitimately maintained on an oral contract of insurance, in view of the state of the law at present: Duer on Insurance, 60; 1 May on Insurance, sec. 14. Most courts, however, in harmony with our own, hold that parties may properly make such contracts under the elementary principle that there is no limitation upon the right of private contract outside of the written law. Some courts have specialized, without any good reason, as to insurance contracts, holding that one may be complete without the element of time for the commencement of the risk being settled: *Potter v. Phenix Ins. Co.*, 63 Fed. 382. Such authorities, however, are highly exceptional and are not to be followed. This court holds to the idea that insurance contracts are to be treated as regards elementary principles the same as others. There are many authorities elsewhere to the same effect as to the precise question under consideration. The following are a few of the illustrations at hand: *Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318, 15 L. ed. 636; *Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153; *Tyler v. New Amsterdam F. Ins. Co.*, 4 Rob. 151; *Hartshorn v. Shoe & L. D. Ins. Co.*, 15 Gray, 240; *Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 16 L. ed. 524; *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610; *Kimball v. Lion Ins. Co.*, 17 Fed. 625; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. 339; *Scammell v. China Mut. Ins. Co.*, 164 Mass. 341, 49 Am. St. Rep. 462, 41 N. E. 649.

By the COURT. The judgment is affirmed.

Cassoday, C. J., took no part.

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*A Contract of Insurance* may rest in parol: *King v. Phoenix Ins. Co.*, 195 Mo. 290, 113 Am. St. Rep. 678; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 75 Am. St. Rep. 358. And if completed by a meeting of the minds of the parties, the insurer will be liable for a loss occurring before the issuance and delivery of the policy; but where delivery and acceptance of the policy are necessary to put the insurance into effect, there can be no risk until the things precedent agreed upon shall happen: *Summers v. Mutual Life Ins. Co.*, 12 Wyo. 369, 109 Am. St. Rep. 992, and see the cases cited in the cross-reference note thereto.



## KOLPACK v. KOLPACK.

[128 Wis. 169, 107 N. W. 457.]

**JUDGMENTS—Res Judicata.**—If a person procures the bringing of an action in the name of the state against another to recover a statutory penalty for obstructing an alleged highway, and the district attorney is called into the case but does not interfere with its management and prosecution by such person and his attorney, a judgment therein that the road in suit is not a public highway is conclusive and binding upon him in a subsequent action against him to restrain him from passing over such road and removing barriers therefrom, although he was not a party to the record in the first action. (p. 30.)

Action to restrain the defendant from passing over and removing barriers from land owned by plaintiff, but which the defendant claimed the right to use as a public highway.

Wallrich, Dillett & Larson, for the plaintiff.

Kreutzer, Bird & Rosenberry and B. A. Cady, for the defendant.

<sup>173</sup> KERWIN, J. 1. The question whether there was a public highway was litigated, and evidence produced upon that issue. The court ruled out the record of former adjudication to the effect that no highway existed, and found upon other evidence that there was no public highway. We do not deem it necessary to review the evidence upon the question of whether a public highway was laid out or acquired by user in the manner provided by law, since we are convinced that the record offered in evidence established the fact that no highway existed at the place in question at and prior to the time of the commencement of the instant suit, and that the judgment in such action is binding upon the defendant here. The evidence shows, and the court found, that in October, 1902, and before the commencement of the present action, an action was commenced against the plaintiff under section 1326 of the Statutes of 1898, to recover the statutory penalty for obstructing the alleged highway in question, and that plaintiff set up the defense that the locus in quo was not a highway, but his private property. The action was commenced in justice's court, and a plea of title to land put in and the case duly transferred to the circuit court for Shawano county, where it was tried, the only question litigated being whether

a highway existed at the place in question. The court held that it did not, and judgment was entered accordingly, which judgment was in force at the time of the trial of this action. It is also established <sup>174</sup> that the defendant procured the bringing of such action and prosecuted the same to judgment, and employed and paid an attorney for such purpose, and was interested in the litigation in an effort to determine that a public highway existed. It appears from the record that the court below concluded that the judgment in the former action was not binding upon him, since he was not a party to the record, the action being prosecuted in the name of the state against the plaintiff. The court, however, found that the private track in controversy was not a public highway, obviously upon the theory that the evidence did not establish that the highway had been legally laid out or acquired by user.

Upon the facts established, the former judgment for recovery of the penalty for obstructing this highway determined in favor of the plaintiff was binding upon the defendant. He had an interest in such controversy in establishing that a highway existed, and took part in the suit, employed and paid an attorney, and managed the litigation because of such interest. While the district attorney acted with the attorney for defendant, it appears that the defendant's attorney was in no way hampered in the conduct and management of the suit. It is established that the road in question had never been used by anyone except the defendant and his family and those going to see them, and that defendant was the real party in interest in establishing whether or not a public highway existed, and carried on the litigation for that purpose. He commenced the action in justice's court without the intervention of the district attorney, who was afterward called in because counsel for plaintiff objected to the prosecution of the action without his presence, and required the notice of trial to be signed by him. But the appearance of the district attorney in the case, as appears from the record, in no manner interfered with the management and prosecution of the case by the defendant and his attorney. It does not appear <sup>175</sup> from the record that the right of appeal was denied the defendant, and it must be presumed from the fact that the district attorney consented to the prosecution of the action and the carrying on of the litigation and co-operation

with the defendant that it was not denied, but, on the contrary, would be authorized by the district attorney and prosecuted if the defendant so desired.

Claim is made by counsel for defendant here that the findings in the former action to the effect that the locus in quo was not a public highway are not sustained by the evidence, for the reason that the court applied a different rule of evidence than in civil actions, and made remarks to the effect that if he were trying the direct question he would hold it a public highway, or he did not know what he would hold on that point. But the findings and judgment of the court in that action must control here, and cannot be set aside or modified by remarks of the court not embodied in the findings or the judgment or intended to be. Moreover, the circuit judge below who tried this action tried the former, and in his finding in this action states that the only contested question in the former action was whether the road was a highway, and that it was found and determined in said former action that it was not a highway, and for that reason the complaint was dismissed upon the merits. So there seems to be no room for doubt from the record on the former suit in evidence, as well as the findings and record in the present suit, that the question of highway was litigated and determined upon the merits against the defendant in the former action, and that although the defendant was not a party to the record, he is, upon well-established principle, bound by the judgment: *Fulton v. Pomeroy*, 111 Wis. 663, 87 N. W. 831; *Boyd v. Wallace*, 10 N. Dak. 78, 84 N. W. 760; *Cramer v. Singer Mfg. Co.*, 93 Fed. 636, 35 C. C. A. 508; *Lane v. Welds*, 99 Fed. 286, 39 C. C. A. 528; *Bennett v. Wilmington S. M. Co.*, 18 Ill. App. 176 17, 7 N. E. 498; *Cole v. Favorite*, 69 Ill. 457; 2 Black on Judgments, 2d ed., secs. 539, 540; *Herman on Estoppel*, sec. 148; 2 Van Fleet on Former Adjudication, sec. 523.

2. The court found a private way by prescription over the road in question, and adjudged that the plaintiff may erect such gates or bars across said private way as his convenience and use of the premises may require, and that the defendant, his agents and servants, shall close such gates after passing through, and entered judgment accordingly. As appears from the statement of facts and the findings, the question of private way by prescription was raised by the pleadings and litigated upon the trial, but we are satisfied from a careful

examination of the evidence that there is no evidence to support the findings that a private way by prescription in favor of the defendant was established. It is established that the defendant commenced using the private track in question in 1878, before any attempt had been made to lay out a highway, and continued to use the same until 1885 with the permission of the plaintiff, and that in 1885 plaintiff told defendant to procure another road. There is, therefore, no evidence of any adverse user by the defendant sufficient to ripen into a prescriptive right for the requisite period before the commencement of this action. We therefore hold that there is no public highway over the premises in question, nor a private way by prescription.

By the COURT. That part of the judgment appealed from by the plaintiff is reversed. The defendant will take nothing on his appeal. Plaintiff is allowed costs in this court on both appeals. The cause is remanded to the court below, with directions to modify the judgment in accordance with this opinion, so as to give the plaintiff the full relief prayed for in his complaint, including costs against the defendant.

Cassoday, C. J., took no part.

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*The General Rules of Res Judicata* are stated in the recent cases of *Brack v. Boyd*, 211 Ill. 290, 103 Am. St. Rep. 200; *Estate of Harrington*, 147 Cal. 124, 109 Am. St. Rep. 118; *La Follett v. Mitchell*, 42 Or. 465, 95 Am. St. Rep. 780. The term "parties" includes those who are directly interested in the subject matter of the suit, knew of its pendency, and had the right to control and direct or defend it: *Courtney v. William Knabe & Co. Mfg. Co.*, 97 Md. 499, 99 Am. St. Rep. 456.

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### RUDOLPH v. STATE.

[128 Wis. 222, 107 N. W. 467.]

**BRIBERY**—Unsuccessful Soliciting by a public officer of a bribe to influence his official action is a crime under a statute providing that any person who shall advise the commission of, or attempt to commit, any felony that shall fail in being committed, shall be punished as prescribed. (p. 33.)

**BRIBERY**—Soliciting Bribe.—If when a city council is just about to pass upon a claim, a member of the council asks the claimant for a sum of money as a condition for voting for the allowance of the claim, and also asks the claimant to pay the same and an additional sum to the other members of the council, offering to

secure favorable action on the claim if such sums were paid, such acts are overt and done in the furtherance of a criminal design and will sustain a conviction for an attempt to commit a felony. (p. 34.)

**BRIBERY—Solicitation of Bribe.**—Testimony of a member of a city council before the grand jury that he knew of no bribery or crookedness in public affairs does not entitle him to immunity from prosecution for soliciting a bribe while such councilman. (p. 35.)

**BRIBERY—Solicitation of Bribe.**—Evidence given by a city councilman before a grand jury that he was at a certain time a city councilman does not expose him to the danger of a prosecution for a crime nor bring him within the constitutional privilege as to self-incrimination, nor make him immune from prosecution for soliciting a bribe while such councilman. (pp. 36, 37.)

J. E. Roehr and J. L. O'Connor, for the plaintiff in error.

L. M. Sturdevant, attorney general, A. C. Titus, assistant attorney general, A. C. Umbreit and F. E. McGovern, district attorney, for the defendant in error.

<sup>227</sup> **SIEBECKER, J.** The defendant alleges that the court erred in holding that the indictment charges an offense under chapter 34 of the Laws of 1901, whereby it is provided that: "Any person who shall advise the commission of or attempt to commit any felony as defined in section 4637 of the Wisconsin Statutes of 1898, that shall fail in being committed, the punishment for which such advice or attempt is not otherwise prescribed in these statutes, shall be imprisoned or fined," as prescribed. It is contended that the court submitted the case to the jury upon the theory that defendant was being prosecuted for the offense of an attempt to commit the crime of bribery, but that the facts alleged and shown by the evidence fall short of establishing an attempt to commit the crime of bribery, for the reason that the fact of soliciting another to join in the commission of this offense does not constitute an attempt, in <sup>228</sup> that the alleged criminal transaction is devoid of any overt acts which are necessary to constitute an attempt to commit a crime. That solicitation to commit a crime is an offense at common law seems well supported by authorities and writers on the criminal law. Mr. Wharton, speaking of the result of the adjudications, states: "Are solicitations to commit crime independently indictable? They certainly are, as has been seen, when they in themselves involve a breach of the public peace, as is the case with challenges to fight and seditious addresses. They are also indictable when their object is interference with public jus-

tice; as where a resistance to the execution of a judicial writ is counseled, or perjury is advised, or the escape of a prisoner is encouraged, or where the corruption of a public officer or a witness is sought, or invited by the officer himself": 1 Wharton on Criminal Law, 10th ed., sec. 179. See, also, 1 Bishop on New Criminal Law, sec. 767; 1 McClain on Criminal Law, sec. 220; Commonwealth v. Flagg, 135 Mass. 545; Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569; People v. Hammond, 132 Mich. 422, 93 N. W. 1084.

The language of chapter 34 of the Laws of 1901 is clear in expressing the idea that to advise or attempt to commit any felony defined in the statute is an offense, punishable as prescribed. The charge preferred in the indictment comes within the definition of this statute, and constitutes an offense within its terms.

It is urged that no attempt to commit a felony is proven by the evidence adduced, because no overt act by the defendant is shown, even though a criminal intent may be manifest. There is evidence tending to show that the defendant asked Hamilton for one hundred dollars as a condition for voting for the allowance of his claim, and urged him to pay it and an additional sum to other committee members, and that he offered to have the committee convened and to secure favorable action on the claim if his demands were granted. These acts occurred just before the committee was to take action and pass upon the claim, and were in immediate connection with and the nearest steps to an actual consummation of the offense. This gives <sup>229</sup> them the character of overt acts, done in furtherance of a criminal design. They are circumstances which show in their very nature that defendant committed them "in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possessing, except for failure to consummate, all the elements of the substantive crime": 3 Am. & Eng. Ency. of Law, 2d ed., 250.

The defendant pleaded immunity from prosecution upon the ground that he had been subpoenaed and had appeared and given evidence before the grand jury. This claim is based on chapter 85 of the Laws of 1901, providing that no witness or party shall be excused from testifying in certain cases upon the ground that his disclosure might expose him

to prosecution for any crime, but that he shall not be prosecuted for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence. It appears that defendant was subpoenaed, that he appeared and was sworn, and that he testified before the grand jury to the effect that he was an alderman from the eleventh ward of the city; that he knew of no bribery or crookedness in public affairs; that he was a member of the railroad committee; and that he did not know who introduced the Manville ordinance. In the case of *State v. Murphy*, 128 Wis. 201, 107 N. W. 470, this statute is construed, and it is there held that a denial by a witness that he knew of bribery in public affairs does not entitle him to immunity upon the ground that he has testified concerning any transaction, matter, or thing within the purview of the statute. The facts of the *Murphy* case (128 Wis. 201, 107 N. W. 470) and of the instant case are, as to this question, in all respects the same, and the decision in that case rules the question here.

It is, however, claimed that when the defendant testified before the grand jury to the fact that he was an alderman from the eleventh ward of the city of Milwaukee, he gave testimony which came within the constitutional privilege that <sup>220</sup> "no person . . . shall be compelled in any criminal case to be a witness against himself" (Const., art. 1, sec. 8), because this fact is material to establish the offense charged in this indictment and of which he was found guilty. In *State v. Thaden*, 43 Minn. 253, 45 N. W. 447, Justice Mitchell, speaking for the court on this subject, says: "All the authorities agree to the general proposition that the statement of the witness that the answer will tend to criminate himself is not necessarily conclusive, but that this is a question which the court will determine from all the circumstances of the particular case, and the nature of the evidence which the witness is called upon to give."

This rule is supported in this court in *Kirschner v. State*, 9 Wis. 140; *Emery v. State*, 101 Wis. 627, 78 N. W. 145, and in other courts in *Calhoun v. Thompson*, 56 Ala. 166, 28 Am. Rep. 754; 1 *Burr's Trial*, 245; *Queen v. Boyes*, 1 Best & S. 311. In the last case cited it is declared "that, to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the

nature of the evidence that the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer." The fact that a witness may be asked to testify concerning a fact which is not a part of a criminal transaction, but is material in a prosecution based on such a transaction, as giving his name or his presence in some locality remote from the scene of crime, or stating whether he was, in fact, a public official at the time it is claimed the offense was committed, do not in themselves constitute incriminating statements tending to show him guilty of crime, though upon a prosecution for some offense it may develop that they are material. It is manifest that if defendant were testifying in another case and he were asked his name, his residence, or whether he had been a certain official at a specified time, it could not be urged that he need not answer upon the ground that it might expose him to a prosecution for a <sup>231</sup> crime, for in themselves they do not tend to show criminality, though a combination of circumstances in connection with some criminal transaction might make it material to show them in a criminal prosecution.

"It is obvious . . . that the notion of a fact tending to criminate' is that of a fact forming, in the phrase of Chief Justice Marshall, 'a necessary and essential part of a crime'": 8 Wigmore on Evidence, sec. 2261.

Mr. Wharton, in his Criminal Evidence, ninth edition, section 466, speaking on this subject, states: "We have several rulings to the effect that a witness cannot be compelled to give a link to a chain of evidence by which his conviction of a criminal offense can be furthered. This proposition, however, cannot be maintained to its full extent, since there is no answer which a witness could give which might not become a part of a supposable concatenation of incidents from which criminality of some kind might be inferred. To protect the witness from answering, it must appear from the nature of the evidence which the witness is called to give that there is reasonable ground to apprehend that, should he answer, he would be exposed to a criminal prosecution. . . . The question is for the discretion of the judge, and, in exercising this discretion, he must be governed as much by his personal perception of the peculiarities of the case as by the



facts actually in evidence. But in any view the danger to be apprehended must be real, with reference to the probable operation of law in the ordinary course of things, and not merely speculative, having reference to some remote and unlikely contingency."

Tested by this rule, we cannot conceive how the bare statement by defendant that at a certain time he was an alderman of the city of Milwaukee, a fact which must obviously have been generally known, could in any degree aid in tending to expose him to the danger of a prosecution for a crime. To give it such significance would certainly be speculative and imaginary; such a result would not follow naturally from such a statement. The following cases have a bearing on this subject: *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. Rep. 232 644, 40 L. ed. 819; *Miskimmins v. Shaver*, 8 Wyo. 392, 58 Pac. 411; *Ex parte Irvine*, 74 Fed. 954. See, also, 1 *Greenleaf on Evidence*, 16th ed., sec. 469d et seq.

It is claimed that the court erred in receiving the evidence of Hamilton and Pease concerning statements made in the clerk's office and before the members of the committee having this claim in charge, and to the effect that, if the claim were not allowed by the committee and council, Hamilton would seek to enforce it by suit. The evidence tends to show that defendant participated in the committee proceeding while this claim was being considered, and that he probably was informed of the claimant's threatened enforcement by suit if it were disallowed by the common council. Under these circumstances the ruling was proper.

Further claim is made that the conversation elicited from Mr. Rose on cross-examination was improper, because it in nowise related to what he, as defendant's witness, had testified on direct examination, which tended to impeach the witness Hamilton, called by the state. It appears sufficiently that this conversation had a bearing on testimony given on direct examination and served to explain it. This made it relevant, and it could properly be adduced on cross-examination.

We find no error in the record.

By the COURT. Judgment affirmed.

Cassoday, C. J., took no part.

**BRIBERY AND SOLICITATION OF BRIBE.**

- I. Definition, 38.**
- II. Elements of the Crime.**
  - a. In General, 38.
  - b. The Thing Given, 39.
  - c. Intent, 40.
  - d. Unofficial or Unauthorized Act, 40.
- III. Officers Who may be Subject of, 42.**
- IV. Solicitation of Bribes, 44.**
- V. Attempt to Bribe, 45.**

**I. Definition.**

At common law the crime of bribery is defined as being "the receiving or offering of any undue reward by or to any person whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and incline him to act contrary to the known rules of honesty and integrity. But it is also taken in a larger sense, and may be committed by any person in an official situation who shall corruptly use the power and interest of his place for rewards or promises and by any person who shall give or offer or take a reward for offices of a public nature, or shall be guilty of corruptly giving or promising rewards in order to procure votes in the election of public officers": *State v. Davis*, 2 Penne. 139, 45 Atl. 394; *Walsh v. People*, 65 Ill. 58, 16 Am. Rep. 569. "Bribery at common law is the crime of offering any undue reward or remuneration to any public officer or other person intrusted with a public duty, with a view to influence his behavior in the discharge of his duty. The taking as well as the offering or receiving of such reward constitutes the crime when done with a corrupt intent": *State v. Miles*, 89 Me. 142, 36 Atl. 70; *Curran v. Taylor*, 92 Ky. 537, 18 S. W. 232. "Bribery may be defined to be the giving (and perhaps offering) to another anything of value or any valuable service, intended to influence him in the discharge of a legal duty. It does not apply to a mere moral duty": *Dishen v. Smith*, 10 Iowa, 212; *People v. Van De Carr*, 87 App. Div. 386, 84 N. Y. Supp. 461. Bribery consists in the offering or receiving of any unlawful present or reward to or by any person in order to influence his conduct in the exercise of any public duty: *State v. Pritchard*, 107 N. C. 921, 12 S. E. 50. Bribery is the voluntary giving or receiving anything of value in corrupt payment of an official act done or to be done: *Henaker v. Board of Education*, 42 W. Va. 170, 57 Am. St. Rep. 847, 24 S. E. 544, 32 L. R. A. 413.

**II. Elements of the Crime.**

a. **In General.**—To constitute the crime of bribery, the gift, advantage, or emolument must be bestowed for the purpose of inducing the officer to do a particular act, in violation of his duty, or as an inducement or favor, or in some manner to aid the person offer-

ing the bribe, or some other person in a manner forbidden by law: *Hutchinson v. State*, 36 Tex. 293; but any attempt to influence an officer in his official conduct unlawfully by the offer of a reward or pecuniary consideration constitutes the crime of bribery, and the crime is complete without the tender of the money: *People v. Ah Fook*, 62 Cal. 493. The offense is complete when the offer of a reward is thus made: *State v. Ellis*, 33 N. J. L. 102, 97 Am. Dec. 707. If the person who accepts the bribe does so with the intent that it shall influence his official action, he is guilty although there was no intention to bribe him by the giver: *State v. Dudoussat*, 47 La. Ann. 977, 17 South. 685; *People v. Bunkers* (Cal.), 84 Pac. 364. Accepting by a public officer of a promise to take money in future for influencing his present official act constitutes bribery: *Schutz v. State*, 125 Wis. 152, 104 N. W. 90. A mutual agreement by the parties to the transaction to commit the crime of bribery is not necessary: *People v. Squires*, 99 Cal. 327, 33 Pac. 1092; *State v. Dudoussat*, 49 La. Ann. 977, 17 South. 685. Thus, if a person makes a full and complete delivery of money to a magistrate with the corrupt intention of influencing his decision in a matter pending before him, such person is guilty of bribery, although the latter receives the money in ignorance of what it is given for and retains it solely for the purposes of public justice: *Commonwealth v. Murray*, 135 Mass. 530. But in many cases the corrupt acceptance of the bribe is of the gist of the offense: *State v. Miles*, 89 Me. 142, 36 Atl. 70. And a police officer who accepts money in consideration of his promise not to arrest certain offenders against the law is guilty of bribery, although the crime is not subsequently committed: *People v. Markham*, 64 Cal. 157, 49 Am. Rep. 700, 30 Pac. 620. Personal participation in a scheme to bribe public officials is not necessary to constitute guilt, and the accomplishment of the act by means of another or others is sufficient: *People v. Kerr*, 6 N. Y. Supp. 647. Thus, the conveyance to a juror of an offer of a third person to bribe such juror is the offering of a bribe by the person conveying the offer, and is no less an offer to bribe because the money to be paid was not to come from his pocket: *People v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129. To constitute the crime of bribery it is not necessary that the reward, benefit or advantage should be given or promised directly to the person whose vote is intended to be influenced, but it is sufficient that the reward is promised or given to another at the instance of the voter: *Commonwealth v. Root*, 96 Ky. 533, 29 S. W. 351.

**b. The Thing Given.**—To constitute the crime of bribery it is necessary that there be a promise to give a gift or an acceptance of money or other thing of value: *State v. McDonald*, 106 Ind. 233, 6 N. E. 607; *Commonwealth v. Donovan*, 170 Mass. 228, 49 N. E. 104; *State v. Howard*, 66 Minn. 309, 61 Am. St. Rep. 403, 68 N. W. 1096, 34 L. E. A. 178; *Watson v. State*, 39 Ohio St. 123; *Commonwealth v. Callaghan*, 2 Va. Cas. 460. Thus, the giving of entertainments for the purpose

of unduly influencing legislation is wholly bad in morals, but it does not constitute the crime of bribery: *Randall v. Evening News Association*, 97 Mich. 136, 56 N. W. 361. And it has been decided that a bank check is not an obligation for the payment of money within the legal meaning of such term as used in the Revised Statutes of the United States providing for the punishment of bribery of United States officers: *United States v. Green*, 136 Fed. 618, affirmed, 199 U. S. 601, 26 Sup. Ct. Rep. 748, 50 L. ed. 328.

On the other hand, it has been decided that it cannot be said, as matter of law, that a negotiable note payable at a future time and delivered to the payor by one of the original makers as a bribe is of no value, and will not support an indictment for bribery: *Commonwealth v. Donovan*, 170 Mass. 228, 49 N. E. 104. And under a statute making it a felony for any person to lend, contribute or pay any money or other valuable thing to any voter to induce him to vote or to refrain from voting for or against any person, or for or against any particular proposition submitted to voters, the use on election day of cigars, liquors or the like to influence votes constitutes a violation of the statutes: *Whaley v. Thomason* (Tex. Civ. App.), 93 S. W. 212.

c. *Intent*.—It is well settled that it is essential to the crime of bribery that the offer, promise or gift be made or accepted with a corrupt intent to influence the official action of an officer in the discharge of his duties: *White v. State*, 103 Ala. 72, 16 South. 63; *State v. Davis*, 2 Penne. 139, 45 Atl. 394; *Johnson v. Commonwealth*, 90 Ky. 53, 13 S. W. 520; *State v. Miles*, 89 Me. 142, 36 Atl. 70; *Commonwealth v. Murray*, 135 Mass. 530; *Hutchinson v. State*, 36 Tex. 293.

But the giving of facilities for the public convenience of the whole county, as an inducement to remove a county seat, or the offering of a public advantage to an entire community, as an inducement to the members of such community to vote for such removal, does not constitute bribery: *Dishon v. Smith*, 10 Iowa, 212. Or the offer of grounds and public buildings as an inducement to the voters of a county to change the county seat is not bribery: *Hall v. Marshall*, 80 Ky. 552.

d. *Unofficial or Unauthorized Act*.—If a bribe is offered or received it is not essential that the act for which it is given be actually done in furtherance of the corrupt agreement in order to constitute the crime of bribery: *State v. Miles*, 89 Me. 142, 36 Atl. 70. But whether an offer to bribe an officer to influence his conduct in a matter not within the scope of his official duty constitutes a crime depends almost entirely upon the provisions of the various statutes, and, as a general rule, the crime of bribery cannot be predicated upon the offer of a reward not to perform duties for the performance of which there is no legal or constitutional warrant: *United*

*States v. Boyer*, 85 Fed. 425. A statute which makes it a crime to offer to bribe an officer with intent to influence him to do or omit to do any act in violation of his lawful duty applies only to acts within the official functions of the officer: *United States v. Gibson*, 47 Fed. 833. An interpreter of the Chinese language appointed by the secretary of the treasury, is not acting within the scope of his official duty under such appointment while serving as an interpreter of such language at a hearing of a criminal charge before a United States commissioner within the meaning of a statute making it a criminal offense to offer to bribe any person acting for or on behalf of the United States in any official function: *In re Yee Gee*, 83 Fed. 145. And an offer made to a person in contemplation of a mere probability that he may be called to perform official functions, and intended to influence his conduct in the performance thereof if he shall be so called, is not within a statute making it a criminal offense to offer to bribe a person exercising any official function with intent to influence his action in his official capacity: *In re Yee Gee*, 83 Fed. 145. An offer to bribe a judicial officer corruptly to decide a case not legally pending before him is not punishable as bribery: *Barefield v. State*, 14 Ala. 603; *Newman v. State*, 97 Ga. 367, 23 S. E. 831.

On the other hand, cases exist which proclaim that the offense of bribery is complete when an offer of reward is made to influence the vote or action of an official, although in a matter not within the jurisdiction of the officer. Thus, an offer of money to a member of a common council of a city to vote in favor of an application for leave to lay a railroad track along one of the streets of a city, it has been decided is bribery whether or not the common council had authority to make the grant, or the railroad company the power to avail itself of its benefits if made, or whether the offer was made before or after the application had been embodied in an ordinance or resolution introduced before the council: *State v. Ellis*, 33 N. J. L. 102, 97 Am. Dec. 707. It has also been decided that it is not necessary, in order to constitute bribery, that the vote of the public official bribed should be on a measure that is valid and can be enforced: *State v. Lehman*, 182 Mo. 424, 103 Am. St. Rep. 670, 81 S. W. 1118, 66 L. R. A. 490. In this case it was said that "if the ordinance was pending before the municipal assembly, and the defendant was bribed to vote in favor of it, or accepted a promise of a bribe to vote for it, then it became immaterial whether the ordinance was valid or invalid. It is not necessary, to constitute bribery, that the vote of the public official bribed should be on a measure that could be enforced. The crucial test may thus be stated: Is a matter pending before the officer in his official capacity, or one that may be brought before him in such capacity? It is not a question as to the force and validity of the ordinance pending. It was a subject that the municipal assembly had a right to legislate upon.

The ordinance was pending before it. Defendant was a member of that assembly. He was not only authorized to vote upon it, but it was his duty to do so, and any corrupt agreement or promise, which had for its purpose an improper influence upon his action in respect to such measure, has all the elements of bribery under the statute, and it makes no difference whether the measure is a valid one or not": *State v. Lehman*, 182 Mo. 424, 103 Am. St. Rep. 670, 81 S. W. 1118, 66 L. R. A. 490. It has been maintained that where a proposition to let a contract for waterworks is one which might come before a city council for official action, the fact that such council had no authority to make the contract does not prevent the payment of money to a councilman to influence his action on the proposition from constituting the crime of bribery: *People v. Mol*, 137 Mich. 692, 100 N. W. 913; *People v. Ellen*, 138 Mich. 34, 100 N. W. 1008. It has also been decided, however, that an offer of money to a member of a board of health to influence his vote on the letting of a contract for the removal of city garbage does not constitute bribery if accepted, where the board of which the officer is a member has no power to let such contract: *State v. Butler*, 178 Mo. 272, 77 S. W. 560.

### III. Officers Who may be Subject of.

Although, at the early common law the crime of bribery could only be predicated of a reward given to a judge or other person concerned in the administration of public justice, yet the modern definitions of bribery include as a subject thereof all persons whose official conduct is in any way connected with the administration of the government.

Any attempt to influence an officer in his official conduct, whether in the executive, legislative or judicial department of the government, by the offer of a reward or pecuniary consideration, constitutes bribery on the part of the person offering the bribe or accepting it: *People v. Swift*, 59 Mich. 529, 26 N. W. 694; *State v. Sullivan*, 110 Mo. App. 75, 84 S. W. 105; *State v. Ellis*, 33 N. J. L. 102, 97 Am. Dec. 707; *State v. Currie*, 35 Tex. 18. Many examples of this rule may be given. Thus, to corruptly offer money to a legislator as an inducement to vote for a candidate for United States senator is bribery: *State v. Davis*, 2 Penne. 139, 45 Atl. 394; or an offer of money or other valuable thing to a member of the legislature of a state with intent to corruptly and feloniously influence his vote upon a bill then pending in such legislature, is bribery: *Watson v. State*, 39 Ohio St. 123. And a state senator who is chairman of a legislative committee, which has commenced an investigation of building associations, and who has received money from the officers of two of such associations on the understanding that they should not be investigated, is guilty of the offense of bribery, though at the time that he took the money the investiga-

tion of the two associations was not pending: *People v. Bunkers* (Cal.), 84 Pac. 364.

A police officer taking money in consideration of his promise not to arrest a certain class of offenders is guilty of receiving a bribe: *People v. Markham*, 64 Cal. 157, 49 Am. Rep. 700, 30 Pac. 620; or a constable who arrests a person without a warrant on an unsworn charge of theft, and then, in consideration of a sum of money paid him by the prisoner's father, allows him to escape: *Moseley v. State*, 25 Tex. App. 515, 8 S. W. 652. But a prisoner held under an illegal arrest cannot be convicted of offering to bribe the officer to allow him to escape: *Moore v. State*, 44 Tex. Cr. Rep. 159, 69 S. W. 521; *Ex parte Richards*, 44 Tex. Cr. Rep. 561, 72 S. W. 838.

Contrary to the general rule that an offer to bribe, whether accepted or not, makes the crime complete, it has been decided in Texas that where one in the custody of an officer, and being conveyed to jail, asked the officer how much he would take to turn the prisoner loose, and let him go, this did not constitute an offer to bribe, the officer replying that the prisoner must not talk that way: *Evans v. State* (Tex. Cr. Rep.), 89 S. W. 1080.

But if a justice of the peace accepts money for failing to institute proceedings against a person whom he knows to be guilty of unlawfully carrying a concealed weapon and divides the money with a deputy sheriff, from whom he received his information, both officers are guilty of taking a bribe: *Morawietz v. State*, 46 Tex. Cr. Rep. 436, 80 S. W. 997.

Bribery, or an attempt at bribery, of an elector is a crime, and so is an offer to pay him money for giving in his ballot: *State v. Jackson*, 73 Me. 91, 40 Am. Rep. 342.

The buying of votes at an election to take the sense of the voters of a county as to making a county subscription in aid of a railroad is bribery: *Curran v. Taylor*, 92 Ky. 537, 18 S. W. 232. If a person intends to, and does, influence the vote of a city councilman at a certain election by the council, by offering and promising to his brother a place on the police force of the city, he is guilty: *Commonwealth v. Root*, 96 Ky. 533, 29 S. W. 351.

If a person offers his labor or services to one of the jurors trying him for a crime if he will procure an acquittal he is guilty of an offer to bribe: *Caruthers v. State*, 74 Ala. 406; and the crime of bribing, or offering to bribe, jurors, is not confined to those actually impaneled and sworn to try a particular case, but applies to all jurors who have been lawfully selected and summoned to act as such: *State v. McCrystal*, 43 La. Ann. 709, 9 South. 922; *State v. Glaudi*, 43 La. Ann. 914, 9 South. 925.

A crime is committed by an attempt to bribe a member of a school board of a school district to induce the making of a contract to put up lightning rods on a schoolhouse: *In re Boseman*, 42 Kan. 451, 22 Pac. 628. So a member of a board of education may be

the subject of an attempt to commit bribery: *State v. Womack*, 4 Wash. 19, 29 Pac. 939; and a prosecuting attorney may be guilty of accepting a bribe: *State v. Henning*, 33 Ind. 189. A person exercising the functions of an officer de facto may be guilty of bribery in the same manner as an officer de jure: *Diggs v. State*, 49 Ala. 311; *State v. Duncan*, 153 Ind. 318, 54 N. E. 1066; *State v. Wynne*, 118 N. C. 1206, 24 S. E. 216; *Florez v. State*, 11 Tex. Cr. App. 102.

#### IV. Solicitation of Bribe.

Although in a few of the states the solicitation of a bribe is not punishable as a crime, the general rule is otherwise, and a proposal by a public officer to receive a bribe is a crime both under the common law and the statutes. Under the common law such an act is a misdemeanor: *Walsh v. People*, 65 Ill. 58, 16 Am. Rep. 569; *People v. Hammond*, 132 Mich. 472, 93 N. W. 1084. But under the statutes it is generally made a felony: *People v. Squires*, 99 Cal. 327, 33 Pac. 1092; *People v. Bunkers* (Cal.), 84 Pac. 364; *People v. Jackson*, 47 Misc. Rep. 60, 95 N. Y. Supp. 286. Under some statutes making bribery of a legislative officer a felony, it is a misdemeanor for such officer to solicit a bribe: *State v. Sullivan*, 110 Mo. App. 75, 84 S. W. 105.

A public officer becomes guilty of a crime when he asks for or offers to receive a bribe, and his subsequent acceptance of it neither adds to his guilt nor the penalty entailed: *People v. Bunkers* (Cal.), 84 Pac. 364. The solicitation of a bribe by a member of the legislature is a complete offense although the person solicited refuses co-operation: *People v. Hammond*, 132 Mich. 422, 93 N. W. 1084. To constitute the crime of asking for a bribe by a public officer, it is not necessary that the person solicited therefor shall consent to give it, or that there shall be any meeting of minds or mutual understanding or agreement between him and the person asking the bribe. It is sufficient if the latter is ready and willing to enter into a corrupt agreement or understanding that his vote or official action shall be influenced by the bribe: *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127. To constitute the offense of soliciting or asking for a bribe, it is not necessary that the person solicited shall consent to give it. All that is necessary is that the officer asking the bribe is willing and ready to enter into a corrupt agreement or understanding to accept it: *People v. Squires*, 99 Cal. 327, 33 Pac. 1092; *People v. Hurley*, 126 Cal. 351, 58 Pac. 814. One who gives or offers a bribe is not, in law, an accomplice of the one who asks for it. Asking for a bribe and offering or giving a bribe are separate and distinct offenses: *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127.

The asking of money by a public officer to influence his action, which is not official, and which he has no authority at law to perform, is not bribery: *People v. Jackson*, 47 Misc. Rep. 60, 95 N. Y. Supp. 286. And a public officer cannot be convicted of the offense of ask-



ing a bribe to influence his official proceedings, unless his office is a public one and the proceedings to be influenced by the bribery are official: *People v. Jackson*, 47 Misc. Rep. 60, 95 N. Y. Supp. 286. The solicitation of a bribe is not punishable as a crime under the statutes of some of the states: *States v. Bowles*, 70 Kan. 821, 79 Pac. 726, 69 L. R. A. 176; *State v. Desforges*, 48 La. Ann. 73, 18 South. 912; *Hutchinson v. State*, 36 Tex. 293.

#### V. Attempt to Bribe.

The technical distinction between bribery and an attempt to bribe is of little or no practical importance, as the authorities agree that offering a bribe constitutes the substantive offense of bribery. Thus the offense of bribery is complete when the offer of a reward is made for a pecuniary consideration to corruptly influence an officer, executive, legislative or judicial, in his official conduct: *Barefield v. State*, 14 Ala. 603; *State v. Ellis*, 33 N. J. L. 102, 97 Am. Dec. 707; *Walsh v. People*, 65 Ill. 58, 16 Am. Rep. 569; *In re Roseman*, 42 Kan. 451, 22 Pac. 628; *State v. Carpenter*, 20 Vt. 9.

An attempt to bribe is indictable whether successful or not: *State v. Keyes*, 8 Vt. 57, 30 Am. Dec. 450. And the actual tender of a bribe is not necessary to perfect the offense, but any expression of an ability to produce a bribe as a gift to an officer to influence him corruptly in the exercise of his official duties is sufficient to complete the offense: *Lee v. State* (Tex. Cr. Rep.), 85 S. W. 804. The solicitation of a bribe does not, however, constitute an attempt to accept or receive a bribe: *State v. Bowles*, 70 Kan. 821, 79 Pac. 726, 67 L. R. A. 176.

### **KELLNER v. FIRE ASSOCIATION OF PHILADELPHIA.**

[128 Wis. 233, 106 N. W. 1060.]

**INSURANCE, FIRE—Policy to Carrier on Goods in Custody.**—If goods shipped to a person are allowed, under a long standing arrangement between him and the carrier, to remain in the latter's warehouse until the former, by written order, directs delivery to his customers, such goods are in the custody of the carrier as a warehouseman within the meaning of a fire insurance policy issued to such carrier. (p. 47.)

**INSURANCE, FIRE—Property Covered.**—A policy of fire insurance issued to a carrier, insuring it, "and other owners as interest may appear," against loss on merchandise, on the property belonging to the carrier or in its custody as a warehouseman, contained in a certain warehouse, covers the property designated, and not merely the carrier's interest or liability in respect to it. (p. 47.)

**INSURANCE, FIRE—Property Covered—No Power in Carrier to Exclude.**—If a policy of fire insurance issued to a carrier insures it and

"other owners as interest may appear" against loss on merchandise in its custody as a warehouseman, and stipulates that the carrier, although it may or may not be liable for any loss, shall, after a loss, give notice to said assurer who was insured thereby, and said notice shall be conclusive upon the assurer as to who, in addition to said carrier, was so insured, this gives the carrier no right to cut off, by electing not to include, designated owners of property covered by the policy. (p. 48.)

**INSURANCE, FIRE—Policy Issued to Carrier—Rights of Owners.**—Under a policy of fire insurance issued to a carrier and insuring it, and "other owners as interest may appear," against loss on merchandise in its custody as a warehouseman, an owner of property covered thereby has a right, when a loss occurred, to adopt the acts of his agent, the carrier, and thereby to secure the benefit resulting from the policy, just as though it had been expressly issued to him. (pp. 48, 49.)

**INSURANCE, FIRE—Proof of Loss.**—If an insurer is notified of a loss by the insured soon after it has occurred, and the latter has submitted an itemized statement of the different articles destroyed in the form of two schedules, one containing those articles which the insured claimed were included, and the other those articles and the names of the owners which may have been insured under the policy, this is sufficient notice and proof of loss to entitle the insured to recover. (p. 49.)

W. H. Mybra, G. D. Goff and C. F. Hunter, for the appellant.

C. H. Van Alstine and R. N. McMynn, for the respondent.

<sup>238</sup> **SIEBECKER, J.** The contract of insurance provides that the transportation company "and other owners as interest may appear" are to be indemnified against loss by fire of the property described and contained in the warehouse specified in the policies, including certain claims thereon, whether "their own or in their custody as warehousemen, forwarders, carriers, or otherwise." It is contended that this agreement covers only such property and such interest therein as the transportation company and the insurance companies intended to include; that from the phraseology employed it is manifest that the transportation and insurance companies contemplated only such property and interests in property as the transportation company had within its warehouse and to which it saw fit to attach the insurance; and that this intention of the parties to the insurance is shown by the subsequent provisions of the policies, authorizing the transportation company to <sup>239</sup> designate what owners of property were to be included in the policies. Neither the transportation company nor the insurance companies deny that the policies cover the interest of the owners of the property designated in schedule "A," which was property stored in the warehouse

at the time of the fire and held in the custody of the transportation company in the course of its business. It is urged, however, that plaintiff's property was not held by the transportation company, but that he left it in the warehouse after delivery for his accommodation, and not within the possession or control of the transportation company as his agent, and for this reason he cannot be deemed to come within the terms of the policy. It may be assumed that the transportation company gave immediate notice to plaintiff of the arrival of his goods; the facts, however, show that they were held for him in the course of their business arrangements until by written order he directed delivery to his customers. It seems that this arrangement was of long standing, and was an inducement to plaintiff to ship his goods over the transportation company's line. There can be no serious question but that plaintiff would have been liable for reasonable additional charges for such storage of his goods had the company chosen to demand it. Under these circumstances the transportation company was the custodian of the goods of the plaintiff, and as such, under the agency specified by the broad terms of the policies, held them for plaintiff, either "as warehousemen, forwarders, carriers, or otherwise." This brought plaintiff within the conditions of the policies and effected insurance on his property in the company's custody, unless it be considered that no indemnity was undertaken against its loss under the insurance clause covering the property of the transportation company and "other owners as interest may appear." The language of this clause in the policy is unambiguous and plain and insures the property designated against loss, and cannot be limited to the interest or liability of the transportation company in respect to <sup>240</sup> it. This harmonizes with the interpretation given to the contract by the insurance and transportation companies as to a portion of the property destroyed, in that they thereby recognized the insurance as being upon the property in the custody of the transportation company and not an insurance of only such property as might be selected by the transportation company: *Wunderlich v. Palatine F. Ins. Co.*, 104 Wis. 382, 80 N. W. 467; *Strohn v. Hartford F. Ins. Co.*, 33 Wis. 648; *Johannes v. Phenix Ins. Co.*, 66 Wis. 50, 57 Am. Rep. 249, 27 N. W. 414; *Johnston v. Charles Abresch Co.*, 123 Wis. 130, 107 Am. St. Rep. 995, 101 N. W. 395, 68 L. R. A. 934, and cases cited.

It is insisted, however, that this construction of the contract is opposed by the subsequent stipulation providing that "the companies named herein as the assured (although they may or may not be liable for any loss) shall, after a loss, give notice to said assurer who was insured hereby, and said notice shall be conclusive upon the assurer as to who, in addition to said companies, was so insured." It is averred that the terms of this stipulation clearly show that the indemnity for loss was to be limited to the property which the transportation company elected to include. Practically, this construction allows the transportation company at its option to cut off any and all claims for loss of property in its custody which was plainly covered by the terms of the policies, and thereby to deprive the owner of the lost property of a right clearly within the terms of the agreement. Such a construction should not be approved if the agreement can be given a reasonable meaning consonant with the intention expressed in the other parts of the policies and by which the rights and interests of the property owners will be preserved. In effecting the insurance the transportation company acted as the representative and agent of the property covered by the terms of the policies, by the terms it fixed the class of owners whose property was insured, and by the notice clause it undertook to notify the insurance companies of what persons were in <sup>241</sup> fact so insured; and the insurance companies assented to the conclusiveness of such ownership. Under the notice this provision in effect provided that the insurance companies were bound, as to who were the owners of the property destroyed, by the notice of the transportation company, but it gave the transportation company no power to cut off any right acquired by owners of property covered by the insurance clause. This interpretation of the stipulation gives reasonable significance to its terms and preserves the rights of all the parties under the other agreements of the policies. Such a construction seems to be the plain meaning of the language employed, which must be deemed to have been so used by the contracting parties. This results in giving effect to all parts of the policies as undertakings to indemnify all of the class of owners in which the transportation company had a special interest, and therefore it includes every person embraced in the class. Under such circumstances the owners had the right, when the loss occurred, to adopt the acts of their agent, the trans-

portation company, and thereby to secure the benefit resulting from the policies, just as though they had originally been expressly issued to them: Johnston v. Charles Abresch Co., 123 Wis. 130, 107 Am. St. Rep. 995, 101 N. W. 395, 68 L. R. A. 934, and cases cited. This right was asserted by the plaintiff in his claim after the fire, and it was sufficiently brought to the attention of the assurers and the other assured.

We find no foundation for the claim that the action cannot be maintained because there is no evidence showing that notice and proof of loss were given and made as required by the contract. It appears that the insurance companies were notified of the fire by the assured soon after its occurrence, and that the assured submitted an itemized statement of the different articles destroyed by the fire; this statement being in the form of two schedules, designated as "A" and "B," the former containing those articles which the assured claimed were included, and the latter those articles and the names of the owners which may have been insured under the policy. <sup>242</sup> This notice is not disputed, but it seems that there is a dispute between the parties as to whether the property described in the latter list was covered by the insurance. We must hold that the assured gave notice and submitted adequate proof of loss to entitle plaintiff to enforce his claim in this action: Vangindertaelen v. Phenix Ins. Co., 82 Wis. 112, 33 Am. St. Rep. 29, 51 N. W. 1122; Flatley v. Phenix Ins. Co., 95 Wis. 618, 70 N. W. 828; Welch v. Fire Assn., 120 Wis. 456, 98 N. W. 227.

By the COURT.—The judgment is affirmed.

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*For Authorities Bearing upon the Decision* in the principal case, see the recent case of Johnston v. Charles Abresch Co., 123 Wis. 130, 107 Am. St. Rep. 995, and cases cited in the cross-reference note thereto.

Am. St. Rep., Vol. 116—4

**LEONARD v. PRUDENTIAL INSURANCE COMPANY.**

[128 Wis. 348, 107 N. W. 646.]

**INSURANCE, LIFE—Lapse and Revival.**—If a life insurance policy provides that in case of lapse for nonpayment of premium, it may be revived at any time within two years upon written application, and payment of arrears of premium, provided evidence of the insurability of the insured, satisfactory to the insurer, is furnished, an insured applying for revival does not stand in the same position as a new applicant, but has a contract right to revival upon the specified conditions, and when these conditions have been complied with, the insurer is bound to act with reasonable promptness and fairness in passing upon the application and notify the insured of the result. The insurer has no right to arbitrary refusal in such case, nor to act upon any information secretly obtained without opportunity for the insured to meet it, and if the insurer acts arbitrarily and unreasonably upon secret information, he is liable on the policy. (p. 51.)

The parts of the contract of insurance involved, so far as they are necessary to an understanding of the opinion, are as follows:

"If this policy be lapsed by nonpayment, it will be revived any time within two years after the date due of such premium, as specified on the first page hereof, upon written application and payment of arrears of premium, with interest at the rate of five per cent per annum, provided evidence of insurability of the insured, satisfactory to the company, be furnished. Application for revival after two years from such date will receive equitable consideration."

"If any premium be not paid when due, this policy shall be void, and all premiums forfeited to the company, except as herein provided."

"If this policy, after being in force two full years, shall lapse for the nonpayment of premiums, the company will continue in force the insurance under the policy for one hundred and twenty days from the date of such premium."

W. M. Bowe and Durment & Moore, for the appellant.

T. J. Connor and H. B. Walmsley, for the respondent.

**352 MARSHALL, J.** The appeal must be tested by the plain obligations of the insurance contract, and a few—perhaps but one—very familiar principles of law.

The failure of the assured to pay the 1904 premium, due July 8th of that year, did not work a forfeiture of the policy.

It caused what is termed in the policy a "lapse"; the commencement of a period of two years during which it still possessed such vitality that, had death occurred within the first one hundred and twenty days thereof, the appellant would have been liable for the <sup>353</sup> full amount stipulated in the policy; and that for the full term the assured, had he lived, was entitled, as matter of contract right—a right bought and paid for, a right as fixed and certain as any other obligation incurred by the appellant or secured by the assured—to have the policy fully restored upon his paying the arrears of premiums, with interest at the rate of five per cent per annum, and furnishing appellant evidence of his insurability satisfactory to it.

So the relations between the parties to the insurance contract when the assured made his application to revive the same were not, by any means, the same as those between an applicant for a policy in the first instance, and the company applied to, as appellant's counsel contend. In the latter, the application could be rejected at the pleasure of the company; the attitude of the applicant being that of one offering to take from another that which such other is not under any legal obligation to deliver. In the case in hand the attitude of applicant was that of one demanding a right which, upon the conditions precedent in the contract to its ripening into a complete obligation, it was not within the power of appellant to successfully withhold.

When the application was made in due form, the arrears paid, the examination by appellant's medical examiner submitted to, and the case fully made up so far as the assured was concerned for action by appellant, the latter was bound by the contract, by necessary implication, to pass upon the matter within a reasonable time, and if the result was unfavorable to notify the assured. Since the result of the examination by appellant's instrumentality in that regard was in every way favorable to the assured, he had a right to assume, not hearing to the contrary, that his evidence of insurability was satisfactory. There was no provision in the contract for the issuance of a revival receipt, nor was there any custom to issue such evidence so far as the record shows. The evidence indicates that the procedure for a revival was <sup>354</sup> (1) to make a written application, using a printed form furnished by the appellant, (2) to submit to an examination

by the latter's medical examiner, the result to be certified thereto by him in accordance with its furnished form, (3) the making of the necessary payment of arrears and charges to the local agent, whose duty it was to certify the fact in that regard, using a printed form likewise furnished for that purpose. These three instruments, showing upon their face the facts entitling an assured to a revival of his lapsed policy according to the method of doing business which appellant adopted and required, close a case ready for the latter's consideration.

The case here was thus fully closed, as appears, and placed in appellant's possession about December 2, 1904. It would have been so closed and placed about one month earlier but for the inexcusable negligence of appellant's medical examiner, for whose default it is responsible. The record thus made, on its face, as is in effect confessed, showed every essential to a continuation of the policy subject to appellant's approval.

In considering the case so made, appellant was bound to act reasonably. The agreement to restore the policy upon specified conditions, when they were satisfied according to the prescribed procedure, wanting only appellant's judgment upon the record made, carried with it, by necessary implication, the obligation to act reasonably and with fairness to the assured. Appellant had no right of arbitrary refusal, or right to act upon information secretly obtained without opportunity for the assured to meet it. Such a course was contrary to the letter and spirit of the insurance contract. The company was entitled to be satisfied of the insurability of the applicant before restoring the policy, but it had no right, by proceedings outside of anything contemplated by the contract, to create dissatisfaction. When in all reason it ought to have been satisfied or to have notified the assured to furnish further evidence, <sup>355</sup> it was bound to be satisfied or to so notify him. It was also bound by contract, as well as in good morals, to act with some reasonable degree of promptness.

Life insurance has come to be deemed so essential to security of the family, in case of the bread-winning member thereof being removed, that for an insurance company, which is continually inculcating that idea, to permit one to sleep upon the faith of an existing contract of insurance with it, when there is none in fact, is a grievous wrong. For appel-



lant in this case to remain silent, as it did for weeks, knowing, or having good reason to know, that the assured supposed his contract had been restored, and in the meantime to pursue a secret investigation and then act upon information thus obtained without opportunity for the assured to meet it, was contrary to the plainest principles of justice, and wholly outside of anything that could reasonably have been in contemplation of the parties when the policy was issued. The contract right to a renewal of the policy upon condition, by necessary implication, carried with it the right to have the proceedings for compliance with such condition treated according to common principles of fairness.

The implied obligation of appellant to act with reasonable promptness in passing upon the application for a renewal of the policy was clearly breached by negligence of its medical examiner in failing to send in his report for some thirty days after the examination and negligence of the appellant in failing to pass upon the case made for some six weeks after receiving the proofs. The implied obligation of appellant to notify the assured of its adverse action within a reasonable time after it occurred, and to return the money paid to it for the renewal, was clearly breached by failure to bring the matter to the attention of the assured during the seventy days he lived after such occurrence.

Appellant's silence for some two months after an apparently perfect case for revival was submitted, precluded it, on <sup>356</sup> principles of estoppel in pais, from subsequently being heard to the detriment of the beneficiary. He who remains silent when in justice to another he ought to speak will not be heard to that other's prejudice when he subsequently breaks such silence, is a rule of equity that applies very clearly to the facts of this case.

The case is one so clearly ruled on familiar principles applicable to contracts of insurance, construed as was evidently intended in this case, that we have reached the conclusion indicated, without any such call for the citation of authorities by way of illustration as to warrant referring thereto. The array of authorities pressed upon our attention by counsel for appellant, dealing with original applications for insurance, are doubtless right as regards the facts with which they deal, but they are entirely unsuitable as guides in reaching a proper decision in this case. Here there was a contract of

insurance in part, as has been said, when the application for revival was made. It had been paid for, and as to the right of restoration it was in full force when the assured's case in that regard was submitted for consideration. It cannot be characterized otherwise than a fraud upon the latter and his beneficiary to go outside such case and act adversely thereto upon information stealthily obtained, giving no opportunity to be heard in opposition thereto, and then to remain silent till the death of the assured, though there was ample time to have acquainted him with the facts days and weeks prior thereto. Such conduct is so out of harmony with the theory and spirit of life insurance contracts, and so contradictory to the attitude uniformly assumed by life insurance companies in soliciting patronage, as to be manifestly outside of anything contemplated by both parties to the policy in question. It cannot receive favorable consideration at the bar of justice.

By the COURT. Judgment affirmed.

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*The Reinstatement of an Insured Person on a forfeiture of his policy is not generally regarded as the making of a new contract, where no different terms are agreed upon: Goodwin v. Provident Sav. etc. Assn., 97 Iowa, 226, 59 Am. St. Rep. 411. It has been held, however, a policy, when reinstated with the consent of the insurer, becomes a new contract as if then for the first time issued: Pacific Mut. Life Ins. Co. v. Galbraith, 115 Tenn. 471, 112 Am. St. Rep. 862.*

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## ALLEN v. CITY OF MILWAUKEE.

[128 Wis. 678, 106 N. W. 1099.]

**MUNICIPAL CORPORATIONS—Street Improvement.**—Under charters which give power to a city to impose, by special assessment, upon abutting lots, the cost of a street improvement only upon competitive bids, cities have no power to adopt a patented pavement, so controlled by a monopoly that there can be no competition, in the fair and reasonable meaning of the word. (pp. 56, 57.)

**MUNICIPAL CORPORATIONS—Street Improvement—Competitive Bids.**—Under a city charter giving the board of public works power, upon the authority of the common council, to make contracts for the use of any patent or patented article or process at a stipulated sum or royalty, and thereupon to order all work, whether chargeable to the city or to lots, to be done with such patented article, the approval of the council must be had of the acquirement of the right to use such patented article, and such charter provision

does not dispense with competitive bidding as an essential to the scheme of paving streets at the expense of abutting lots. It nowhere authorizes the contract for the work to be made with a person who, by reason of his patent, can exclude all other bidders. (p. 58.)

**MUNICIPAL CORPORATIONS—Street Improvements—Void Contract.**—Under a charter providing that the board of public works shall have power, under authority of the common council, to make a contract with the patentee to use any patent or patented article, process, combination or work for the said city, at a stipulated sum or royalty for the use thereof, is contemplated the acquisition of a right to operate under a patent for a royalty, and then the letting of the actual work to the highest bidder, and the charter provision is not complied with by a contract with the patentee of a street pavement that an amount nearly equal to two-thirds of the whole cost of the paving should go to the patentee without competitive bidding, the patentee agreeing for the price paid to supply other material and do part of the work in making the improvement. (p. 59.)

**MUNICIPAL CORPORATIONS—Street Improvement—Void Contract—Injunction.**—If a city has entered into an invalid contract for the construction of a street improvement, and the invalidity is of a character likely to prejudice adjoining property owners in a manner or degree not readily separable from the burden which might be lawfully imposed upon them, they are entitled to enjoin the proceedings. (p. 60.)

**CONTRACTS—Foreign Corporation—Statutory Construction.**—A statute providing that contracts of a foreign corporation, which has not complied with the requirements of the statute, shall be wholly void on its behalf, must be enforced according to the words. (p. 61.)

**MUNICIPAL CORPORATIONS—Injunction.—Payment by City Officers of money which the city does not owe may be enjoined at the suit of a taxpayer.** (p. 61.)

Appeal from an order dissolving a temporary injunction. Allen, the plaintiff, an owner of real estate fronting on Jackson street in the city of Milwaukee, brought an action against the city, the members of the board of public works, and the contractor, to enjoin the payment of any money by the city or the issue of any special assessment certificates for the grading and paving part of said street under a contract with the Central Bitulithic Paving Company. The board of public works reported to the common council that it was necessary to pave such street with a permanent bitulithic pavement having a concrete foundation, and the common council passed a resolution to that end, providing for an assessment of part of the cost thereof upon abutting lots and payment of the balance by orders on the city treasurer. The board of public works then prepared specifications calling for a six inch concrete foundation and a two inch wearing surface of finer stone mixed, with "Warren's Brand, Nos. 19 and 24

Bituminous Water Proof Cement or Bitulithic Cement," and a separate finish of "Warren's Quick Drying Bituminous Flush Coal Composition," and then a layer of stone chips rolled into the last. A pavement so constructed and laid is fully covered and controlled by patents owned by a corporation known as the "Warren Bros. Company." The specifications required that the contractor should protect and hold the city harmless against any and all claims for any patented article that might be used in connection with the work, and such contractor is a subsidiary part of the "Warren Bros. Company." "Warren Bros. Company" filed with the board of public works a proposal substantially to the effect that anyone to whom a contract for paving might be awarded for improving the streets with their pavement might have the right to so pave by paying to them one dollar and forty cents per square yard for finished pavement, for which they agreed to mix and supply the two inch wearing surface, the flush coating cement and stone chips for flushing and wearing surface; also to furnish an expert to supervise the work and to grant the use of all patents necessary to the work. The contract provided for a price of two dollars and twenty cents per yard for paving, but no work had been done thereunder at the time of the commencement of the suit. After answer to the temporary injunction, it was dissolved by order of court, and plaintiff appealed.

Ryan, Ogden & Bottum, for the appellant.

C. Runge, city attorney, and A. Jones, for the respondents.

682 DODGE, J. In *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205, this court decided that under charters which give power to the city to impose, by special assessment, upon abutting lots the cost of a street improvement only upon competitive bids, cities have no power to adopt a patented pavement so controlled by a monopoly that there can be no competition, in the fair and reasonable meaning of the word. For nearly forty years the legislature has approved this construction of such grants of power by re-enacting them in substantially the same form, and in some instances by making special provision for obtaining the benefits of patents. The authority of that case in this respect has not been contradicted. In *Kilvington v. City of Superior*, 83 Wis. 222, 53

N. W. 487, 18 L. R. A. 45, urged by respondents, the decision in no wise conflicts with the earlier case. It proceeds upon and gives effect to a distinction fully recognized in *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205, namely, that such general city powers as lighting streets, purchase of a fire-engine, or destruction of garbage are generally and broadly conferred by other clauses of our city charters, and that as to them the requirement that purchases of materials or letting of work be done upon competitive bidding is merely regulative of a <sup>683</sup> duty which the city government is bound to perform; and, as a result, that the legislature must be deemed not to have intended the requirement for competitive bidding to apply where it could not. The field is one of construction of our own statutes enacted after the rule of *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205, was announced, so that views of courts in other jurisdiction upon their statutes are by no means controlling if even relevant. For Milwaukee, however, the legislature, evidently recognizing the rule of *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205, as established generally, proceeded to provide a method of obtaining privileges under patents entirely consistent with all provisions elsewhere in the charter for competitive bidding. Without doubt that legislation was intended to exclude any other method of acquiring for the city the advantages of patented rights, articles, or processes for any purpose: *Ricketson v. Milwaukee*, 105 Wis. 591, 81 N. W. 864, 47 L. R. A. 685. That statute (section 23, chapter 5, of present charter) provides: "The said board shall have power, under the authority of the common council, to make a contract or contracts with the patentee or his licensees or assigns, to use any patent or patented article, process, combination, or work for the said city, at a stipulated sum or royalty for the use thereof. And thereupon the said board shall have power to order any work, whether chargeable to the said city or to lots, parts of lots, or parcels of land therein, to be done with the use of such patent or patented article, process, combination, or work; and whenever the owner or agent of any lot, part of lot, or parcel of land in said city, or other person authorized by law to do such work, shall do the same and use any such patent or patented article, process, combination, or work in doing the same, he shall pay to city the sum or royalty chargeable therefor; or the amount of such sum or royalty

may be charged as a special assessment upon the respective lots, parts of lots, and parcels of land in front of which such patent was so used, and collected for the use of said city, as other special taxes are collected."

This enactment clearly intends, while permitting the city to acquire the right to use patented articles or processes by <sup>684</sup> purchase of such right, to require approval of the council for such purchase, and, of course, that the subject shall have been so submitted for consideration by the council that no reasonable doubt that they have consciously and intentionally given the authority can arise. It is certainly debatable whether submission of the question of paving Jackson street with a "bitulithic pavement" as if there were several kinds which might be in competition, and a resolution merely in the affirmative, can be construed as an authority to the board of public works to contract for the privilege of laying "Warren's bitulithic pavement" covered by a patent. It is at least open to argument that the purpose of the board to make such contract was so obscured, if not concealed, that the subject may not have been purposely passed on by the council; especially in view of the prohibition imposed on the board by chapter 107 of the Laws of 1903, that no special brand of asphalt shall be required by name to be furnished in any specifications for street paving. We, however, need not decide this question, for it is also clear that section 23, chapter 5, was enacted as a part of the whole charter and to enable the making of improvements in the manner and according to the scheme prescribed, although but for that section such other requirements would be inconsistent with a patented article or process. One essential of the scheme for paving streets at the abutters' expense is competitive bidding, and it is clear that section 23, chapter 5, does not intend to dispense with that. It nowhere authorizes the contract for the work to be made with the person who, by reason of his patent, can exclude all other bidders, nor does it anywhere authorize imposition by special assessment of anything but the "royalty" which the city may pay by reason of the non-competitive contract for the use of the patent authorized by that section, in addition to the cost of the work ascertained by competition under the other provisions of the charter. Obviously the legislative purpose contemplated, as to such work, the acquisition of a <sup>685</sup> right to operate under the

patent for a royalty and then, and only then, the letting of the actual work to the lowest bidder. Does the offer made by the patentee constitute any such contract, even conceding that the board of public works has so accepted that offer as to close a contract, and that the council has authorized such action? It seems to us to come very far from it; indeed, to disclose a studied attempt to evade the purpose of the charter so as to confer upon the patentee a contract for a large part of the work to be done without even the formality of any bidding therefor. It is to be noticed that nearly two-thirds of the whole cost of the paving, viz., one dollar and forty cents out of two dollars and twenty-five cents, is to go to the patentee, and for that price it agrees to supply the crushed stone for the upper two inches of the pavement, to do the work at Milwaukee of sorting, coating, and mixing this stone with hot asphalt hour by hour as the work proceeds, to supply and prepare for laying the flushing coat in the same way, to furnish the stone chips for the final surface, and to hire an advisory expert for the progress of the work. Can the one dollar and forty cents per yard of pavement thus to be paid the patentee in any reasonable sense be termed "royalty," which, by the terms of section 23, chapter 5, the city may include in, or add to, the special assessment, or does such work, in large part, fall within the "use of a patent, or patented article, process," etc., for which alone the city is so authorized to contract? Any such contention would be absurd. The bulk of the patentee's agreement is for doing the paving. If such a division of the work of an improvement can be dictated by the patentee, where must he stop in absorbing into his noncompetitive contract other parts of that work? May he not insist that crushed stone and cement for the six inches of concrete be purchased from him at his own price, or that his teams and rollers shall be employed to do the work, or that he alone perform still other parts of the work till the supposed competitive bidder is reduced to a mere name? If patentee may absorb two-thirds of the work<sup>ess</sup> and price, we see no very logical stopping place short of complete nullification of the right of the lot owner to have competitive bidding, which, of course, is a valuable right, theoretically at least tending to lessen the cost. Indeed, under the terms of this proposal from Warren Bros. Company the city seems not to acquire the right to "use" the patent or

process. The only offer on that subject is that the successful bidder, not the city, shall have the right to use the patents so far as necessary in laying the pavement. It is difficult to discover that this would confer any right on the city to use patent, process, or combination; and yet it probably must use them from time to time as the pavement may require resurfacing or other repair with the patented materials. These considerations lead us to the conclusion that no contract such as is authorized by section 23, chapter 5, was made with the patentee or its assigns, hence that no jurisdiction was acquired to order, or contract for, the doing of the work involving the use of the patent; hence that the attempted contract with defendant Central Bitulithic Paving Company was void.

Concluding, as we must, therefore, that no valid contract was ever made for doing this work, and that the invalidity was of a character highly likely to prejudice the plaintiff in manner and degree not readily separable from the burdens which might lawfully be imposed upon him, we must hold that the court should have enjoined the proceedings at once. When it is clear as matter of law that there can be but one result of a litigation, and that an act will be void if done, but harmful to the plaintiff meanwhile, the court should interpose to maintain the status quo: *Beaser v. Ashland*, 89 Wis. 28, 61 N. W. 77; *Liebermann v. Milwaukee*, 89 Wis. 336, 61 N. W. 1112; *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603. Plaintiff's right is entirely free from the obstacle found in *State v. La Crosse*, 101 Wis. 208, 77 N. W. 167, *State v. Gosnell*, 116 Wis. 606, 93 N. W. 542, 61 L. R. A. 33, and *Beaser v. Barber A. Co.*, 120 Wis. 599, 98 N. W. 525, and many other cases, where the plaintiff stood by and allowed contractor to incur expense of a work without warning, for here due promptness was exercised in notifying defendants of plaintiff's claim, both as taxpayer and lot owner, that the contractor could receive no pay, either in money from the city or in assessments against plaintiff's property, if he persisted in acting under his void contract; this action having been commenced before any work was done.

The reasons already stated which result in the conclusion that the contract attempted to be made by the board of public works was illegal, and therefore void, are supplemented by the provisions of section 1770b of the Statutes of 1898. This



statute provides that contracts of a foreign corporation which has not complied with the requirements of that section "shall be wholly void on its behalf . . . but shall be enforceable against it." That such enactment is intended to be enforced according to its words was decided in *Ashland L. Co. v. Detroit S. Co.*, 114 Wis. 66, 89 N. W. 904. Confessedly, when the contract in question was made, the defendant Central Bitulithic Paving Company had not complied with the conditions of section 1770b of the Statutes of 1898. It has, therefore, no legal right to demand, nor is the city under any legal obligation to pay, any money by reason of the contract. The right of a taxpayer to enjoin the payment by city officers of money which the city does not owe is most thoroughly established by a long line of our own decisions, only a few of which need be cited: *Frederick v. Douglas Co.*, 96 Wis. 411, 71 N. W. 798; *Rice v. Milwaukee*, 100 Wis. 516, 76 N. W. 341; *Mulberger v. Beurhaus*, 102 Wis. 1, 78 N. W. 402; *St. Croix Co. v. Webster*, 111 Wis. 270, 87 N. W. 302; *Kircher v. Pederson*, 117 Wis. 68, 93 N. W. 813.

As the facts were all before the court, and left no reasonable doubt as to the final result, the temporary injunction against payment out of the city treasury of the moneys which ~~ess~~ would be due if the contract were valid should not have been dissolved.

By the COURT. The order appealed from is reversed, and the cause remanded for further proceedings according to law.

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*The Letting of Public Contracts* to the lowest responsible bidder is discussed in the note to *State v. Rickards*, 50 Am. St. Rep. 489. A provision in a city charter that certain contracts shall be let to the lowest responsible bidder is mandatory, and a compliance therewith is essential to the validity of such contracts: *Inge v. Board of Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20. And where a statute provides that work shall be let to the lowest responsible bidder, and that all bids and proposals shall be sealed and directed to the common council and accompanied by a bond, the power to make contracts depends on substantial compliance with the statute; and if a contract is made in some other way, it constitutes no warrant for the disbursement of public moneys: *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ARKANSAS.**

**STIEWEL v. WEBB PRESS COMPANY.**

[79 Ark. 45, 94 S. W. 915.]

**CORPORATIONS—Notice of Meetings.**—Although it is well settled that corporate acts required to be done or authorized by corporation directors must be at a meeting at which all are present, or have an opportunity to be present, this rule is for the benefit of the shareholders, and acts done by three of the directors thereof at a time and meeting when a fourth director is absent and not notified are binding when such fourth director is a shareholder and director in name only. (p. 65.)

**CORPORATIONS—Enforcement of Contract—Equity.**—If a corporation accepts and retains the benefit of a contract which calls for the execution of a mortgage and notes, which, when executed in pursuance of the contract, are void for informality, a court of equity will require the corporation to execute the mortgage and notes in a proper and legal form. (p. 66.)

J. M. Moore, W. B. Smith and J. M. Moore, Jr., for the appellant.

Ratcliffe & Fletcher, for the appellee.

<sup>46</sup> **McCULLOCH, J.** This is a suit in equity to dissolve a domestic corporation, the El Dorado Compress Company, having its principal place of business at the city of Little Rock in Pulaski county, and to dispose of its assets and distribute the proceeds among its creditors and shareholders.

The suit was originally instituted by a receiver appointed by the Pulaski chancery court to take charge of the assets of the Bank of Little Rock, that concern being a creditor and the holder of shares of the capital stock of the compress company, but during the progress of the suit appellant, Abe

Stiewel, was substituted as plaintiff, he having succeeded to the rights of the bank. It is alleged that the compress company is insolvent, and no longer performing its corporate functions.

Appellees, Webb Press Company, Limited, of Minden, Louisiana, a foreign corporation, and R. L. Floyd, as trustee, were also made defendants, to prevent by injunction the foreclosure of a deed of trust, with power of sale, executed by the compress company upon its compress plant at El Dorado, Arkansas, to secure a debt of fifteen thousand dollars due to the press company. It is alleged in the complaint that said trustee was about to sell said property, under the power contained in the deed, at public outcry in El Dorado, and that a sale for cash on short notice at that place would result in a sacrifice of the property. A writ of temporary injunction was issued, as prayed, preventing the sale by the trustee, and a receiver was appointed by the court to take charge of and protect the property pending the suit. Subsequently the property was sold under order of the court, and the proceeds of sale were ordered to be paid into court.

The press company filed its answer and cross-complaint, setting forth the contracts and trust deed executed by the compress <sup>47</sup> company, and asking that its lien thereunder be foreclosed. The plaintiff, by answer to the cross-complaint, attacked the validity of the trust deed on the alleged ground that said deed had been executed by the president and secretary of the compress company without authority from the board of directors, one of the directors not having been present at nor received notice of the meeting at which the pretended authority was voted.

The facts established by the pleadings and proof are as follows:

On May 28, 1902, the El Dorado Compress Company was incorporated by E. H. Lake, J. S. Alphin, E. H. Smith and C. T. Walker; the capital stock specified in the articles of incorporation being sixteen hundred shares of twenty-five dollars each, subscribed, seven hundred and eighty shares by Lake, five hundred and eighty shares by Alphin, two hundred shares by Smith, and forty shares by Walker. The four shareholders were named in the articles of incorporation as directors. Walker was named as stockholder and director only for the purpose of completing the organization. No

stock was ever in fact issued to him, nor did he ever pay anything. He never in fact acted as director, never attended a meeting of directors, or was notified of such meeting, or was consulted about the business of the corporation. He was cashier of the Bank of Little Rock.

On June 7, 1902, a written contract was entered into between the compress company and the press company, whereby the latter agreed to furnish and erect for the former at El Dorado, not later than September 1st of that year, a press of the kind and quality described, for the sum and price of twenty-one thousand dollars, to be paid by the compress company in three installments of two thousand dollars, each ending when the press should be ready for operation, and the remainder of fifteen thousand dollars in six equal installments.

The contract contained the following stipulation with reference to these payments: "Six notes are to be given for these six time payments, falling due respectively on the dates above mentioned, all said notes to bear interest at the rate of six per cent per annum from September 1, 1902, and all accrued interest to be paid annually on May 1st. Said notes to be secured by deed of trust to the entire compress plant in which this compress is to be erected, and are to be the first claim against said plant. Said notes are to be further <sup>48</sup> secured by first insurance policies taken in standard companies and written 'Loss, if any, payable to the Webb Press Company, limited, as its interest may appear.' During the first thirty days after this press is erected, it is to be tested, and, if found to meet the guaranty herein given, it is to be at once accepted by the party of the second part, and the said six first-mortgage notes and the deed of trust securing same are to be at once properly executed and delivered to the party of the first part by the party of the second part."

Pursuant to this contract the press company delivered and erected the press, the payment of six thousand dollars was made, and the notes for fifteen thousand dollars and trust deed or mortgage were duly executed on October 20, 1902, by the president and secretary of the compress company. A resolution of the board of directors authorizing the execution of the notes and deed of trust by the president and secretary was adopted at an informal meeting of the directors attended by Lake, Alphin and Smith, but Walker was not notified thereof, and did not attend.

On final hearing of the case the chancellor rendered a decree in favor of the press company, declaring a superior lien in its favor for the amount of its debt, and ordering the same to be paid out of the proceeds of sale of the property.

The plaintiff appealed.

<sup>50</sup> 1. Waiving the question of Walker's eligibility as a director, and treating him as a de facto officer of the corporation, did the failure to notify him of the meeting or to consult him about the execution of the mortgage invalidate its execution?

It is undisputed that Walker was a shareholder and director in name only. He had no interest in the corporation, did not claim any, and did not assume to act as director. He testified that he took no part in the management of the affairs of the concern, and knew that they were looked after by Lake and the other parties interested.

<sup>51</sup> It is well settled that corporate acts required to be done or authorized by the directors must be at a meeting at which all are present or have an opportunity to be present. The separate, individual approval of the directors will not suffice. This court, in discussing the reasons of this requirement, said in *Estes v. German Nat. Bank*, 62 Ark. 7, 34 S. W. 85: "The object of this rule is the benefit and protection of the shareholders of the corporation. The duties of the board are imposed upon more than one member in order that they may be discharged with that wisdom derived from a conference discussion, and a comparing of views upon business affairs; and for this purpose they are required to meet and take counsel of each other. As all this is for the benefit of the shareholders, who constitute the corporation, they may waive the necessity of the meeting of the board for the transaction of the business within their corporate powers. They can do so by permitting the directors to establish a habit or usage of assenting separate to the making and performance of contracts by their agents. By permitting such usages or habits to be formed by a long course of business, they adopt and become bound by them, so long as they acquiesce. If this were not so, great injustice might be done to parties contracting with them in their usual way."

In *Texarkana etc. Ry. Co. v. Bemis Lumber Co.*, 67 Ark. 542, 55 S. W. 944, it was held that where the president had been in the habit of executing promissory notes in the name

of the corporation without express authority of the board of directors, of which custom the board was cognizant, the corporation would be bound by a note so signed, the same as though express power had been conferred. The court there said: "The board of directors must be held, under the circumstances, to have acquiesced, and the corporation was bound for the same, as though the board of directors had, by formal action, conferred upon the president express authority to make the note."

In *G. V. B. Min. Co. v. First Nat. Bank*, 95 Fed. 23, 36 C. C. A. 633, the circuit court of appeals for the ninth circuit said: "Where the president of a corporation is given full power and authority to conduct and manage the business, and deal with the property and affairs of the corporation in such a manner, and for such a length of time, as to justify others with whom he transacts business <sup>52</sup> in believing that he had authority to do the acts in the manner and in the way performed by him, the people with whom he transacts business have the right to deal with him upon the assumption that he has such authority; and the corporation, having knowledge of the exercise of such acts, and of the manner in which the corporate business was transacted, cannot thereafter, to the injury and prejudice of such parties, deny his authority or disaffirm or set aside his acts": See, also, *Fifth Ward Bank v. First Nat. Bank*, 48 N. J. L. 357, 1 Atl. 478; *Topeka Primary Assn. v. Martin*, 39 Kan. 750, 18 Pac. 941.

The case at bar lacks the element of long acquiescence by the corporation in the acts of the board of directors without consulting Walker, but the principle is the same where all the real parties in interest had knowledge of such acts and consented thereto. The only persons interested in the corporation were Lake, Alphin and Smith, and they were present at the meeting and authorized the execution of the notes and mortgage. Walker knew that the other three directors were managing the affairs of the corporation without consulting him, and he made no objection.

The rule requiring that all the directors should have an opportunity to participate in the transactions of the corporation, being for the benefit of the shareholders, there was no one else to complain, as Walker had no real interest to protect.

2. The superior lien of the press company must be upheld upon still another ground. The contract calls for a mortgage to secure payment of the notes, the corporation accepted and retained the benefits of the contract, and equity would, under the familiar maxim that "equity treats that as done which ought to have been done," require performance of that part of the contract if the officers had not already executed the mortgage and notes: *Lowe v. Walker*, 77 Ark. 103, 91 S. W. 22; *Block v. Smith*, 61 Ark. 266, 32 S. W. 1070.

The decree of the chancellor was right, and must be affirmed. It is so ordered.

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*Directors of a Corporation* can act in behalf of it only as a board. Their power is not joint and several, but joint only: *Buttrick v. Nashua etc. R. R. Co.*, 62 N. H. 413, 13 Am. St. Rep. 578. But it is not necessary to the binding action of a board of directors that each member should take part in the deliberations: *Ten Eyck v. Pontiac etc. R. R. Co.*, 74 Mich. 226, 16 Am. St. Rep. 633. However, a majority of a quorum is essential to the adoption of a resolution: *Smith v. Los Angeles etc. Assn.*, 78 Cal. 289, 12 Am. St. Rep. 53.

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## SCOTT v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

[79 Ark. 137, 95 S. W. 490.]

**RAILROADS—Negligence—Duty to Look and Listen.**—Generally, travelers are guilty of negligence if, before going upon railroad crossings, they fail to look and listen for the approach of trains, but if the circumstances in a particular case are such that an ordinarily prudent person might not expect a train to pass at that moment, it is a question for the jury as to whether or not he was guilty of contributory negligence in failing to stop, look and listen. (p. 74.)

**RAILROADS—Contributory Negligence—Failure to Look and Listen.**—If a person approaching a spur railroad track in daylight sees a train standing on such track and then crosses to the main track, where he is struck by a car, which, unknown to him, has been cut out from the train on the spur track and is being "kicked" on the main track, the question as to whether or not he is guilty of contributory negligence in failing to look and listen before going upon the main track is one of fact for the jury to determine. (p. 74.)

F. Smith and J. W. & M. House, for the appellant.

B. S. Johnson and J. E. Williams, for the appellee.

<sup>139</sup> McCULLOCH, J. This is an action brought by Lula L. Scott, as administratrix of the estate of her deceased husband, George W. Scott, to recover damages resulting from the death of said George W. Scott, caused by the alleged negligence of the defendant, St. Louis, Iron Mountain and Southern Railway Company. He was run over and killed by defendant's train at Earle, a station in Crittenden county on defendant's road, and negligence of the servants of the company is charged in "kicking" a caboose and several boxcars down the main track without keeping a lookout and without giving warning of the approach of the cars. The defendant denied the charge of negligence, and alleged contributory negligence on the part of said decedent in failing to look and listen for approaching cars before going upon the track.

The court directed a verdict in favor of the defendant, and plaintiff appealed. The sole question for our determination, therefore, is whether the testimony, giving it the strongest probative force, was sufficient to warrant a verdict in favor of the plaintiff.

It is not contended that the evidence did not establish negligence on the part of the train operatives in failing to keep a lookout. Witnesses testified that the caboose and boxcars were "kicked" down the main track, and that no one was on or near the end of the train keeping lookout. But it is urged that, according to the undisputed evidence, deceased was guilty of negligence in going upon the track in front of the approaching cars without looking and listening.

The facts are substantially as follows: The village of Earle contains about two hundred or two hundred and fifty inhabitants, and lies mainly on the north side of the railroad track, though there is one business <sup>140</sup> house and several residences on the south side of the track. There is a switch track about six feet north of and parallel with the main track, and a spur track called the "Crittenden spur," curving off from the south side of the main track, which runs out to a sawmill. The spur connects with the main track four hundred and seventy-one feet west of the point where deceased was run over, and it is one hundred and ninety-two feet from the latter point (where deceased was run over) due south to the spur. The main track and sidetrack are upon a dump or embankment about eight feet high, and across them runs a path which has been generally and frequently used by those



residing in the vicinity in crossing the tracks. Deceased was traveling this path, going south, when he was run over and killed. There is a seedhouse on the dump, and the path crosses the track three or four feet east of it. When the injury occurred, there were several boxcars standing on the switch track within three or four feet west of the path. The path, after crossing the switch track, diverged slightly toward the east, so that it was twenty-one feet from the center of the switch track, where the path crossed, to the center of the main track at the crossing.

The injury occurred in the daytime. Deceased lived on his farm, a short distance south of the station, and on this occasion had visited the postoffice, which was north of the tracks, and was attempting to recross, going southward. The freight train had come in from the east, passed the station and switches, and, backing toward the east, detached the caboose and two or three cars on the rear end of the train, and "kicked" them down the main track, and the balance of the train with the engine attached backed down the Crittenden spur. Deceased walked up the dump, traveling the path and upon the switch track, and about came to a stop in the middle of that track near the end of the line of the stationary cars, and looked toward the right. He could not then, on account of those stationary cars, see down the main track, whence the caboose and cars were approaching, but could see the balance of the backing train on the Crittenden spur, which was then about due south of him about sixty yards distant. He passed over the switch track, following the path which diverged to the left, and was in the act of stepping upon the main track, when the moving caboose struck and instantly killed him. His head was found between the rails of the main track, and his <sup>141</sup> body between the two tracks. The witnesses say that just as the caboose struck him he looked to the right over his shoulder and threw up his hands. His back was almost squarely toward the approaching cars as he traveled the path between the tracks.

This occurred in broad daylight, and evidently deceased could have seen the approaching cars if he had looked. There was nothing to hinder. The only question is, therefore, whether we shall say that he should have looked, and that, as a matter of law, he was guilty of negligence when he failed to do so.

In the recent case of *Tiffin v. St. Louis etc. Ry. Co.*, 78 Ark. 55, 93 S. W. 564, after announcing the general rule that travelers upon the highway, before going upon railroad crossings, are bound to look and listen for the approach of trains, and that it is deemed negligence per se for them to fail to do so, we stated certain exceptions where such omission cannot be said to be negligence per se, but should be left to the jury to determine whether or not the failure to look and listen was consistent with the exercise of ordinary care. The following, among other exceptions to the general rule, was stated: "Where the circumstances are so unusual that the injured party could not reasonably have expected the approach of the train at the time he went upon the track": Citing *French v. Taunton Branch R. R.*, 116 Mass. 537; *McGhee v. White*, 66 Fed. 502, 13 C. C. A. 608; *Bonnell v. Delaware etc. R. Co.*, 39 N. J. L. 189. We declined to apply this exception in that case because the state of the proof did not warrant it. The evidence established the fact that trains were constantly passing the crossing in each direction.

In *McGhee v. White*, 66 Fed. 502, 13 C. C. A. 608, a decision by the United States circuit court of appeals for the sixth circuit, the facts were that a traveler attempted, at a public crossing, to cross the railroad track where a work train had passed about a minute and a half before, and was struck by another train going in the same direction, and it was held that the case was one for the jury to determine whether or not under those circumstances he was guilty of negligence, as he had reason to believe that another train was not following within so short a time or distance. Judge Taft, speaking for the court, said: "At least, this circumstance prevents us from holding, as a matter of law, that his failure to <sup>142</sup> look was contributory negligence. It required the submission of the issue to the jury."

In *French v. Taunton Branch R. R.*, 116 Mass. 537, the facts were that the plaintiff, without looking up or down the track, attempted to cross immediately after a train had passed, and was run over by cars following behind it which had been detached from the same train for the purpose of making a running switch, and it was held that the question of contributory negligence was properly submitted to the jury. The court, in disposing of the question, said: "Whether the plaintiff was in the exercise of that due care which persons

of common prudence and intelligence would exercise when placed in a similar situation, and whether she was careless in failing to look up the track at the point near the crossing where it was visible, was a question for the jury to determine in the peculiar circumstances of the case": *Ferguson v. Wisconsin Cent. Ry. Co.*, 63 Wis. 145, 23 N. W. 123; *Phillips v. Milwaukee etc. R. R. Co.*, 77 Wis. 349, 46 N. W. 543, 9 L. R. A. 521; *Duane v. Chicago etc. Ry. Co.*, 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. 394; *Palmer v. Detroit etc. R. R. Co.* 56 Mich. 1, 22 N. W. 88; *Chicago etc. R. Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801; *Baker v. Kansas City etc. Ry. Co.*, 122 Mo. 533, 26 S. W. 20; *Bowen v. New York Cent. etc. R. R. Co.*, 89 Hun, 594, 35 N. Y. Supp. 540; *York v. Maine Cent. R. R. Co.*, 84 Me. 117, 24 Atl. 790, 18 L. R. A. 60; *Randall v. Connecticut R. R.*, 132 Mass. 269; *Alabama etc. R. Co. v. Summers*, 68 Miss. 566, 10 South. 63.

In all these cases there existed circumstances which the court held to be so unusual that the traveler may reasonably have been deceived by appearances, and on account thereof failed to look and listen when he might have discovered the danger, and the court refused to declare such omission to be negligence per se.

In *Ferguson v. Wisconsin Cent. R. Co.*, 63 Wis. 145, 23 N. W. 123, the facts were that deceased, before attempting to cross the railroad track, waited for an engine to pass, but immediately went upon the track while he was enveloped with smoke and steam from the passing engine, and was struck by cars which had been detached for the purpose of making a "running switch." He could have seen the approaching detached cars if he had waited for the smoke to clear away; and the court was asked to declare, as a matter of law, that he was guilty of negligence in failing to do so. The court in passing upon this contention said: "No court has applied and enforced the above rule more uniformly and consistently <sup>143</sup> than has this court in numerous cases adjudicated by it. Had the plaintiff gone upon the track in front of the engine and been injured, it would probably have been a case for the application of the rule; but no such case is presented in this record. The plaintiff waited for the engine to pass before he went upon the track, and, having done so, the question we are to determine is, Should he have ascertained before going upon the track that a running switch was being made, and

a detached car was moving rapidly down the track upon him? We find nothing in the testimony which shows that the plaintiff knew, or ought to have known, the existence of those conditions when he approached the track for the purpose of crossing it. The jury may well have found from the testimony that the noise of the car on the track was drowned by that made by the passing engine; that when he stepped upon the track he was so enveloped in smoke and steam from the engine that he could not see the approaching car; and that he did not know or have reason to suspect that a running switch was being made. Under these circumstances it would manifestly be unjust to apply to the plaintiff the rule above stated in all its rigor."

The same learned court in a later case (*Duame v. Chicago etc. Ry. Co.*, 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. 394), in discussing the same question said: "As a general rule, and unaffected by other circumstances, the proposition urged in the brief of the learned counsel of respondent that one approaching a railroad crossing who may, by looking, have a timely view of an approaching train, is bound to look and listen for its approach before attempting to cross the track, and that a failure to do so is negligence, may be correct, and the circuit court most probably applied this strict rule to the plaintiff's case. We do not think that such a rule would be applicable to the case. There is a most important fact in this case that materially modifies this strict rule, and makes it inapplicable, and that is that this train had just passed this crossing, while the deceased was within a few rods of it and driving upon a trot, and had passed on out of his sight, and he had reason to suppose that it would continue on, it being upon the main track, like any other train upon its regular route, and had no reason to suppose that it would immediately return. The presumption was that it would go on and not return. He was thus thrown off his guard."

<sup>144</sup> In *York v. Maine Cent. R. Co.*, 84 Me. 117, 24 Atl. 790, 18 L. R. A. 60, the supreme court of Maine, where the facts were that plaintiff's intestate was struck by cars which had been detached from the engine in making a flying switch, said: "It is true that a traveler upon a highway before crossing a railroad should look and listen for approaching trains. It is usually clear, indisputable negligence in the traveler not to do so, as has been repeatedly held by this court. If noth-

ing indicates to the contrary, trains of some kind, or at least locomotives, are liable to pass at any moment, and the traveler should be continually on his guard against them. But sometimes there may be indications that nothing will pass along the railroad for some minutes at least. . . . In view of the well-known and necessary rule requiring considerable space and time between successive trains, the passage of one train may be an indication that no other will pass the same way for some minutes. These and other acts upon the part of the railroad may throw the usually prudent traveler off his guard, and free him from the reproach of negligence in attempting to cross at such a time."

The only distinction between the case at bar and most of the cases cited is that in those cases the succeeding trains of cars passed on the same track, whilst in the case at bar they passed upon different tracks.

In the case of *Phillips v. Milwaukee etc. R. Co.*, 77 Wis. 349, 46 N. W. 543, 9 L. R. A. 521, the detached cars were by a running switch sent down a different track from that on which the traveler had just seen them pass, and the court held that the question of contributory negligence was, under the circumstances, one for the jury. The court said: "He [deceased] was thus deceived and thrown off his guard, and had no reason to expect that any of those cars would interfere with his crossing the sidetrack on the sidewalk, or that they would so soon be sent down that track without anyone to look after them. The jury might well have excused the deceased from looking for any of these cars on the south track going east at that time, and have found that he was not guilty of any contributory negligence under these peculiar circumstances."

We see no distinction, however, in the fact that the cars follow upon the same track or upon a parallel track. The question is, Were the circumstances so unusual that different conclusions <sup>145</sup> may reasonably have been drawn by men of ordinary prudence as to anticipating the approach of a train at the time the traveler attempted to cross without looking in that direction? If there is nothing in the circumstances to deceive the traveler and throw him off his guard, and he goes upon the track without looking and listening, then he is guilty of an act of negligence, and the court should declare it as a matter of law; but if the circumstances were such that

an ordinarily prudent person might not expect a train to pass at that moment, it is then a question to be submitted to the jury to say whether or not he has been guilty of negligence.

Now, applying that rule to the facts of this case as presented by the testimony in the most favorable light to appellant's cause of action, let us see what conclusion the jury might have reached.

Deceased approached the track in broad daylight, and, before he went behind the cars standing on the switch track, could see for considerable distance up and down the track. There was but one train at or near the station, and he saw that train on the main track backing toward the south. When he walked up the dump and passed behind the cars on the switch track, he hesitated, or stopped, and looked to the right as far as he could, and saw what he doubtless thought was the same train of cars with the engine attached backing down the Crittenden spur. He did not know that some of the cars had been detached and "kicked" on down the main track. He was deceived by this circumstance, and with feeling of security walked on down the path to the edge of the main track, where he was struck and killed. Would a reasonably prudent person have so acted under the circumstances? That question should have been submitted to the jury with appropriate instructions, and the court erred in refusing to do so.

Reversed and remanded for a new trial.

Hill, C. J., and Battle, J., dissent.

HILL, C. J., Dissenting. I think the court goes too far in holding that there was a question for a jury in this case. The rule applicable to this case was stated in *St. Louis etc. Ry. Co. v. Hitt*, 76 Ark. 224, 88 S. W. 911, as follows: "But, as explained in the *Martin* case, the failure to look and listen is not always negligence. There may be circumstances as there instanced, <sup>146</sup> or where there is an invitation by the railroad, express or implied, which might relieve a prudent person from this duty. But all those matters are exculpatory, and the duty to continue to look and listen should be definitely put upon the plaintiff; and if there is sufficient evidence of exculpatory circumstances, then the whole question should go to the jury, and no part of it be determined by the court."

Charged with the duty of looking and listening when approaching the main track of the railroad, Mr. Scott discharged it by stopping on a sidetrack where his view in one direction was obstructed by cars upon the sidetrack; and, seeing about two hundred feet away on a spur track the engine and part of the train which had shortly before arrived at the station, he went ahead across the main track without ever looking to his right, where part of the train was approaching without engine, lookout or signal. The negligence of the company in allowing a detached part of a train to travel without lookout, signals or warning along a much traveled public way was shocking; but the negligence of Mr. Scott in assuming with a hasty glance that all the train was on the spur track and blindly going onto the main track without looking to see what was plain to be seen, was likewise negligence; and I fail to see any exculpatory circumstances justifying submission to the jury.

Mr. Justice Battle concurs herein.

*A Person About to Cross a Railroad Track* is ordinarily held to the duty of looking and listening for approaching trains: *Butler v. Rockland etc. Ry. Co.*, 99 Me. 149, 105 Am. St. Rep. 267, and cases cited in the cross-reference note thereto; *Koch v. Southern Cal. Ry. Co.*, 148 Cal. 677, 113 Am. St. Rep. 332.

*For a Railroad Company to Make "Flying" or "Running" Switches* when it is practicable to avoid it and make the switch in a safer way: *Mitchell v. Illinois Central R. R. Co.*, 110 La. 630, 96 Am. St. Rep. 472, and see the cases cited in the cross-reference note thereto.

## SECURITY MUTUAL INSURANCE COMPANY v. WOODSON.

[79 Ark. 266, 95 S. W. 481.]

**INSURANCE, FIRE—Waiver of Proof of Loss.**—A fire insurance company, by denying any liability whatever under its policy, and refusing to pay a loss, waives proof of loss. (p. 77.)

**INSURANCE, FIRE—Condition to Keep Books.**—If a person insured against loss by fire of merchandise and fixtures keeps books showing how many goods were received, and how many were sold from the date of the issuance of the policy up to the time of the fire, he substantially complies with a condition in his policy that he should keep a set of books presenting a complete record of the business transacted, including all purchases, sales and shipments both for cash and credit. (p. 78.)

**INSURANCE, FIRE—Misrepresentation by Agent—Sole and Unconditional Ownership.**—A false representation of sole and unconditional ownership by the insured of the goods covered by the policy does not avoid it, when such representation is superinduced by the agent of the insurer, who, knowing its falsity at the time, wrote such falsehood into the application for the insurance. (pp. 78, 79.)

Mehaffy & Armistead, for the appellant.

Jobe & Eakin, for the appellees.

<sup>267</sup> WOOD, J. This is a suit on a policy of fire insurance. The property insured was a stock of general merchandise valued at eight hundred dollars, furniture and fixtures including iron safe for the store and office, valued at fifty dollars, and store building, valued at one hundred and fifty dollars.

The complaint set up the contract of insurance, and alleged the loss, on the 14th of November, 1903, of the property by fire, a compliance by plaintiff with the terms of the policy to entitle it to recover, and prayed for the amount of the policy.

The complaint set up the contract of insurance, and alleged that the plaintiffs were bound by the by-laws, rules and regulations of the company, it being a mutual company, and by the application which was made a part of the policy, and denied that the plaintiffs took an inventory on the day of the application as they had represented; alleged that their goods at that time would not inventory thirteen hundred dollars, as stated in their application; alleged that they did not carefully preserve their books and invoices in an iron safe or in some place secure against fire, so that they might be secure from fire, so that they might be submitted to the adjusters, as they agreed in their application they would do; that they did not keep the last preceding inventory; that they <sup>268</sup> made fraudulent representations at the time of making said application that their stock of goods was worth thirteen hundred dollars, that their house was worth two hundred dollars, and that their store fixtures and safe were worth one hundred dollars; that the policy contained this provision: "Loss to be paid sixty days after due and satisfactory proofs of the same shall have been made by the assured and received at the company's office in Little Rock, Ark., in accordance with the terms and provisions of this policy herein mentioned"; alleged that nothing was due and nothing payable under this



policy until sixty days had elapsed after receiving proof of loss at the office in Little Rock, and that said proof of loss was not received sixty days prior to the commencement of the action.

The cause was submitted to a jury, and its verdict was in favor of appellee for the amount of the policy.

1. Appellant contends that there was no proof of loss, as required by the terms of the policy. But appellant denied any liability whatever, and refused to pay. "Proof of loss." therefore, was waived: *Greenwich Ins. Co. v. State*, 74 Ark. 72, 84 S. W. 1025.

2. It is next contended that the appellee did not keep a set <sup>269</sup> of books as required by the policy, which contained the standard provision on that subject, and did not comply with the iron safe clause. Such books as the appellee kept were not destroyed. The proof tended to show that a book was kept showing how many goods were received and how many were sold from the date of the issuance of the policy up to the time of the fire. What is termed in the evidence the "merchandise account" taken from the book kept was introduced without objection. It showed the amount of the merchandise received from the date of the issuance of the policy up to the time of the fire. It was shown that a cash-book was kept showing the amount of goods sold. It was shown that appellee lost all the goods that were not sold. It was shown that appellee kept books showing the goods that were received and the goods that were sold. The difference between these, of course, would show the goods that were on hand. Appellees made an inventory showing the amount of goods that were on hand when the policy was issued. The insurance agent was on hand at the time the policy was issued, and examined the stock. The policy required the assured to keep a set of books which "shall clearly and plainly present a complete record of business transacted in reference to the property herein mentioned, including all purchases, sales and shipments, both for cash and credit, from date of the inventory provided for in the preceding section and during the life of this policy, or this policy shall be null and void."

The statute provides: "In all actions against any fire insurance company, individual or corporation, for any claim accruing or arising upon or growing out of any policy upon personal property issued by any such company, individual or

corporation, proof of a substantial compliance with the terms, conditions and warranties of such policy, upon the part of the assured, or party, individual, person or corporation to whom it may have been issued, or their assigns, shall be deemed sufficient, and entitle the plaintiff to recover in any such action": Kirby's Digest, sec. 4375a. This act was passed March 29, 1899, and every policy of insurance written since its passage on personal property must be construed as if this provision were written in it. We are of the opinion that the proof showed a substantial compliance with the "bookkeeping clause" of the policy. The object of that clause <sup>270</sup> was to enable the insurer to ascertain the property that was on hand and the value thereof at the time of the fire, and it is reasonably clear from the testimony that appellant could have received all the information required by the above provision by an inspection of the books and inventory which appellee had kept and had on hand at the time of and after the fire.

3. The application, which was a part of the policy, contains this question: "Is your title absolute to the property proposed for insurance?" Answer, "Yes." The application is signed, "J. E. Woodson & Company." One of the partners testified: "One of the bills is for my personal account. It is made out to C. E. Gosnell. I had some stuff there that belonged to me, part of the goods, some surgical instruments and some books. The way that came, we asked Mr. Milburn for two policies. We asked for a policy for J. E. Woodson & Company's stuff and for a policy for my individual stuff, and Mr. Milburn said it wasn't necessary, and it would be expensive, and for us to list the stuff together and take one policy, and if we happened to a loss we could settle that between us." Appellant contends that the proof shows that the representation was false, and that it avoids the policy, which requires that the interest of the assured should be sole and unconditional. But this representation was superinduced by the agent of the company, whose business it was to solicit the insurance and write the application therefor. His knowledge was the knowledge of the company. If this representation was false, the company must be held to have known of its falsity at the time its agent wrote the falsehood into the application. This is clearly a matter which the agent taking the application could, and which the proof shows he did.

waive. The representation was directly in the line of the agent's employment and bound the company. To hold otherwise would be enabling the company to take advantage of its own wrong and to perpetrate a fraud on an innocent party.

The case of *Germania Ins. Co. v. Bromwell*, 62 Ark. 43, 34 S. W. 83, cited by counsel for appellant, does not support its contention. On the contrary, the principles announced there, when applied to the facts of this record, will be found to sustain the doctrine we have announced here. In that case before any breach of the conditions constituting the forfeiture, and before the issuance of <sup>271</sup> the policy, the agent undertook by his statements to do away with a promissory warranty that was contained in the policy. Here there was a breach of the condition requiring sole and unconditional ownership at the time the assured made the representation. The condition existed at the time the policy was issued and before, and the insurer knew it. It did not relate to a condition that was to be performed in the future. A forfeiture for a breach of such condition, of course, could not be waived until the forfeiture had taken place.

The judgment is affirmed.

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**In the Subsequent Case of *People's Fire Ins. Assn. v. Goyne*, 79 Ark. 315, it was decided that an insurance company may be estopped by the conduct of its agent, acting within the apparent scope of his authority, from availing itself of a false answer to a material question or other breach of warranty or violation of the provisions of the application or policy, notwithstanding clauses in the application or policy to the effect that the company shall not be bound by any such conduct or representation of its agent. Such estoppel may be proved by parol evidence, although clauses in the policy or application provide that no waiver shall be effective unless indorsed in writing on the policy at the home office of the company.**

*A Condition in a Policy of Insurance* that the insured shall keep a set of books and preserve an inventory should be accorded a reasonable interpretation so as not to work a forfeiture if substantially complied with: *Western Assur. Co. v. McGlathery*, 115 Ala. 213, 67 Am. St. Rep. 26; *Ruffner Bros. v. Dutchess Ins. Co.*, 59 W. Va. 432, 115 Am. St. Rep. 924, and see the cases cited in the cross-reference note thereto.

*A Denial of Liability for a Loss under a Policy of Insurance* is a waiver of proof of loss: *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295; *Home Ins. Co. v. Koob*, 113 Ky. 360, 101 Am. St. Rep. 354; *Angier v. Western Assur. Co.*, 10 S. Dak. 82, 66 Am. St. Rep. 685; *Wilson v. Commercial Union Assur. Co.*, 51 S. C. 540, 64 Am. St. Rep. 700, and cases cited in the cross-reference note thereto.

## CORNEY v. CORNEY.

[79 Ark. 289, 95 S. W. 135.]

**JUDGMENTS—Fraud in Procurement.**—If a decree of divorce is obtained upon constructive service by plaintiff's falsely alleging that he resided in the county where the action was brought, and that his wife was a nonresident of the state, she is entitled to have the decree set aside on the ground that it was procured by fraud, and the court will, at her instance, vacate the decree and dismiss the complaint for want of jurisdiction. (p. 81.)

**JUDGMENTS—Fraud in Procurement—Want of Jurisdiction.**—If a decree of divorce is obtained by fraud, and without jurisdiction, a suit will lie after the term to have it vacated and set aside, whether there was a valid defense to the original suit or not. (p. 82.)

S. R. Chew, for the appellant.

Meyers & Bratton, for the appellee.

<sup>290</sup> McCULLOCH, J. Appellant, Robert B. Corney, obtained a decree for divorce from his wife, Mary F. Corney, in the chancery court of Sebastian county, Fort Smith district, on March 18, 1903. The suit was commenced on September 22, 1902, and a warning order was duly issued and published. Appellee brought this suit in said court to set aside the decree for divorce on the alleged ground that it was procured by fraud practiced upon appellee and upon the court. It is alleged in the complaint that appellant, at the time of the institution of said suit for divorce and during its pendency, was not a resident of the Fort Smith district, Sebastian county, but was a resident of Crawford county, Arkansas; and that appellee was, at the time, a resident of the state of Arkansas. She also alleged that appellant <sup>291</sup> made the affidavit upon which the warning order was issued with full knowledge that she was a resident of and was actually in the state, and that she was absent from her said husband by his procurement and command, and that she had not deserted him, as alleged in his complaint.

Appellant answered, denying all the allegations of fraud in the procurement of the decree and reiterating his allegations as to grounds for divorce. He also denied that appellee was residing in the state of Arkansas when the suit was instituted, or that he was not a resident of the Fort Smith district of Sebastian county at that time.

The cause was heard upon oral testimony adduced in open court, and a decree was rendered vacating and annulling the decree for divorce and striking appellant's original complaint from the files of the court.

The evidence sustains the findings of the chancellor that appellant was not a resident of the Fort Smith district of Sebastian county when he instituted and prosecuted the suit for divorce, and that appellee was in the state of Arkansas when the suit was instituted, and that appellant knew of her presence in the state. He was in frequent correspondence with her, writing letters to her in terms of endearment and expressing great solicitude for her health and happiness. He sent her money from time to time, and said nothing about suing for a divorce. Finally he addressed a letter to her at Green Forest, Arkansas, on September 20, 1902, just two days before he commenced suit for divorce, in which he sent money to enable her to go to Joplin, Missouri, where he advised her to go for the benefit of her health. Appellant was then living at Van Buren, in Crawford county, Arkansas, engaged in the practice of medicine, and appellee was traveling about in Marion and Carroll counties, following some vocation or profession the precise nature of which is not disclosed by the testimony.

It is needless to add that appellant, under the state of facts detailed above, committed a fraud, not only upon his wife but also upon the court, in procuring a decree for divorce upon constructive service and in a court which had no jurisdiction of the subject matter. Suits for divorce must be brought in the county where the plaintiff resides: Kirby's Digest, sec. 2674. He was then residing in Crawford county. He made affidavit, for the purpose <sup>292</sup> of procuring the issuance of a warning order, that his wife was not a resident of the state of Arkansas, when he knew that she was in the state, and he fraudulently induced her to leave the state immediately thereafter, without disclosing his purpose of suing for a divorce.

The principles of law announced by this court in *Womack v. Womack*, 73 Ark. 281, 83 N. W. 937, 1136, sustain the decree of the chancellor vacating the divorce decree.

It is contended, however, by counsel for appellant that the court erred in refusing to permit appellant to introduce testimony tending to establish the grounds for divorce set forth in the original complaint, and in refusing to consider the cause

upon the original complaint after vacating the decree. In *Womack v. Womack*, 73 Ark. 281, 83 N. W. 937, 1136, this court held that, as a condition precedent to the maintenance of a suit to vacate a decree for divorce on the ground of fraud in its procurement, it must be adjudged that there was a valid defense to the original suit. In that case, however, the court had jurisdiction of the cause of action set forth in the original complaint for divorce, whilst in the case at bar the court had no jurisdiction because the plaintiff did not live in the county.

When the court vacated the decree on the ground of fraud in its procurement, nothing remained to be done but to dismiss the original complaint for want of jurisdiction to proceed further. It is true, appellee did not in her complaint pray that the original suit be dismissed, but only asked that the decree be vacated so that she could defend against the allegations of the original complaint. Her failure, however, to ask for that relief, or even her express consent to a trial of the issues raised by the original complaint, could not confer jurisdiction upon the court.

We find no error in the decree, and the same is in all things affirmed.

Hill, C. J., not participating.

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*The Vacation of Judgments and Decrees* on motion when not specially authorized by statute is considered in the note to *Furman v. Furman*, 60 Am. St. Rep. 633. The power of a court to vacate a judgment after the time specified in the statute for granting relief therefrom is considered in the note to *Nicklin v. Robertson*, 52 Am. St. Rep. 795. And relief in equity other than by appellate proceedings from judgments and decrees is considered in the note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218.

**GARNER v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.**

[79 Ark. 353, 96 S. W. 187.]

**CARRIERS—Liability for Freight.**—A carrier's liability begins when it receives freight for immediate shipment, and is not dependent upon the issuance of a bill of lading. (p. 83.)

**CARRIERS—Title to Goods Shipped—Recovery for Loss.**—If, in the usual course of dealing, goods are delivered to a carrier to be delivered to the consignee, and the carrier then delivers a bill of lading which is then delivered either directly to the consignee or with a draft attached to a bank, when in due commercial course it would reach the consignee, the mere delivery of the goods to the carrier with shipping directions does not pass the title to the consignee, and in case of their loss before delivery the consignor is entitled to recover their value. (p. 84.)

Cravens & Covington, for the appellants.

<sup>355</sup> **HILL, C. J.** The Garners were merchants at Lamar, and contracted to sell Lesser Cotton Company one hundred bales of cotton at seven and one-half cents f. o. b. the railroad platform. When delivered to the railroad, a bill of lading was issued, and Garner would attach it to a draft drawn on Lesser Cotton Company, and collect the draft at his bank. The details of the sale are not otherwise important. The Garners had eight bales of cotton at Knoxville, and directed it shipped. It was delivered upon the railway platform, the numbers checked by the agent preparatory <sup>356</sup> to issuing a bill of lading, and shipping instructions were delivered to the agent. The night of the day when the cotton was put on the platform the station burned, and this cotton was destroyed. The Garners sued the railroad company for its value, and the court directed a verdict for the railroad company, and the Garners have appealed.

A carrier's liability begins when it receives freight for immediate shipment, and is not dependent upon the issuance of a bill of lading: *St. Louis etc. Ry. Co. v. Neil*, 56 Ark. 279, 19 S. W. 963; *St. Louis etc. Ry. Co. v. Murphy*, 60 Ark. 333, 46 Am. St. Rep. 202, 30 S. W. 419; *Little Rock etc. Ry. Co. v. Hunter*, 42 Ark. 200. There was ample evidence to go to the jury on the contention that the cotton was received for immediate shipment, although a bill of lading had not been issued.

Appellee's counsel has not favored the court with a brief, but appellants' counsel states that his theory was that from the evidence of *J. S. Garner* it was shown that the cotton belonged to Lesser Cotton Company, and not to the Garners. This was evidently the theory upon which the verdict was directed.

A bill of lading represents the property. It is a muniment of title, and is both a receipt and contract: *Turner v. Israel*, 64 Ark. 244, 41 S. W. 806; *Ray on Negligence of Imposed Duties of Freight Carriers*, sec. 25. When such instruments are attached to drafts, then the title to the property passes with the draft, and the pledgee or purchaser of the draft has a special ownership in the goods, which he may assert against everyone: *Ray on Negligence of Imposed Duties of Freight Carriers*, sec. 31. But this principle cannot control here. The testimony of *Garner* shows that he was not entitled to receive anything on the cotton under this contract with Lesser Cotton Company until he received his bill of lading. Then he was entitled to draw for the money. In this way Lesser Cotton Company was protected, for it could hold the cotton against the world upon such an instrument. It would pay the draft, or a bank would cash it in reliance upon such payment, only when the bill of lading was attached thereto conveying the title. Until the Garners furnished Lesser Cotton Company with the muniment of title, they were not entitled to receive a cent on the cotton under the contract. This cotton was being prepared to follow a course of <sup>357</sup> affairs when the title would pass to the cotton company. The first step was delivery to the carrier, the next securing a muniment of title, and finally to deliver that muniment either directly to the Lesser Cotton Company or to a bank with draft attached when in due commercial course it would reach the cotton company. In this case only the first step had been taken, the delivery to the railroad company. None of the other necessary acts to change the title to Lesser Cotton Company had been performed.

Appellant's counsel say that appellee relied upon "opinions of this court in certain liquor cases in support of his contention." Doubtless, reference is made to *State v. Carl*, 43 Ark. 353, 51 Am. Rep. 565, and cases following it, where it was held delivery to the carrier completed the contract. *Burton v. Baird*, 44 Ark. 556, is another instance where de-



livery to the carrier in pursuance of directions from the other party completed the contract. But those cases do not reach to this one. Here the mere delivery to the carrier with shipping directions was not the termination of Garner's conduct to complete his sale. He had to get a bill of lading and attach it to a draft before he was entitled to a cent, and hence his sale was not complete when he delivered the cotton to the carrier. This was not the final act in consummation of his contract. This was Garner's evidence. It was reasonable and consistent with a common business practice, and, if given credit, the cotton was appellants' at the time of the fire. The case should have gone to the jury.

Judgment reversed, and cause remanded.

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*The Liability of a Carrier Begins* when the shipper surrenders the entire custody of his goods, and the carrier receives complete control of them, for the purpose of shipment at the earliest practicable opportunity in the usual course of business: See the monographic note to Denver etc. R. R. Co. v. Peterson, 97 Am. St. Rep. 84.

*When a Vendor Delivers Goods to a Carrier* for transportation to the vendee, the title usually passes to the latter: Templeton v. Equitable Mfg. Co., 79 Ark. 456, post, p. 88; Scharff v. Meyer, 133 Mo. 428, 54 Am. St. Rep. 672, and cases cited in the cross-reference note thereto. But if the seller ships goods with a bill of lading providing for a delivery to the consignee on payment of the draft attached, the seller prima facie reserves the title until payment of the draft: Greenwood Grocery Co. v. Canadian etc. Elevator Co., 72 S. C. 450, 110 Am. St. Rep. 627.

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## GUNTER v. STATE.

[79 Ark. 432, 96 S. W. 181.]

**BURGLARY—Chicken-house.**—The breaking and entering a chicken-house is burglary within the meaning of a statute defining that crime to be "the unlawful entering of a house, tenement, railroad car or other building, boat, vessel or water craft, in the night-time, with intent to commit a felony. (p. 86.)

**BURGLARY—Sufficiency of Proof.**—Proof that chickens were taken from a chicken coop does not sustain a charge of burglary in breaking and entering a chicken-house. (p. 87.)

**BURGLARY.—Unexplained Possession of All or a Part of recently stolen goods or property will warrant a conviction of larceny, and also of burglary, where the larceny is proved to have occurred at the time of the breaking and entry of the house. (p. 87.)**

T. S. Osborne, for the appellant.

R. L. Rogers, attorney general, and G. W. Hendricks, for the appellee.

<sup>433</sup> McCULLOCH, J. The defendant, Will Gunter, was tried and convicted under an indictment containing two counts, one count charging him with the crime of burglary in breaking and entering the chicken-house of George Maledon, with intent to steal, take and carry away the personal property of said Maledon, and the other count charging him with the crime of grand larceny in stealing thirty-three chickens of the value of more than ten dollars, the property of said Maledon.

The sufficiency of the indictment was not questioned below, but it is contended here that breaking and entering a "chicken-house" does not constitute burglary. The statutes of this state defining the crime of burglary are as follows:

"Sec. 1603. Burglary is the unlawful entering a house, tenement, railway car or other building, boat, vessel or water craft, in the night-time, with the intent to commit a felony.

"Sec. 1604. The manner of breaking or entering is not material, further than it may show the intent of the offender.

"Sec. 1605. If any person shall, in the night-time, willfully and maliciously, and with force, break or enter any house, tenement, boat, or other vessel or building, although not specially named herein, with the intent to commit any felony whatever, he shall be deemed guilty of burglary."

<sup>434</sup> It will be seen that this definition is sufficiently comprehensive to embrace any kind of house or building—any structure which is of such a character as to fall within the ordinary acceptance of those words, and which is capable of sheltering man or property of any kind: 6 Cyc. 191, 192. Under similar statutes in other states chicken-houses are held to be within the statutes: *People v. Stickman*, 34 Cal. 242; *Gillock v. People*, 171 Ill. 307, 49 N. E. 712; *Williams v. State*, 105 Ga. 814, 70 Am. St. Rep. 82, 32 S. E. 129; *Willis v. State*, 33 Tex. Cr. App. 168, 25 S. W. 119.

The indictment sufficiently charges the crime of burglary, but the evidence does not sustain that charge. The prosecuting witness, Maledon, testified that he missed thirty-three of his chickens, and found where they had been taken out of the "coop" the night before through a hole cut in the wire

around the coop. He was not asked to describe the structure, and did not do so, further than to refer to it as a coop. Now, a chicken-coop is not necessarily a house, and, as it was incumbent on the state to prove that a house or building was broken and entered, the crime of burglary was not established by this evidence. It is true that Mrs. Maledon was introduced as a witness to prove that she heard noises that night out where the chickens were kept, and the prosecuting attorney, propounding questions to her, referred to the place as the chicken-house, but neither of the witnesses used that term in referring to the place where the chickens were kept.

The only evidence connecting the defendant with the commission of the crime was that Maledon, two or three days after the burglary, found and identified in his possession five of the stolen fowls. The defendant made no attempt to explain his possession of the recently stolen property. Unexplained possession of property recently stolen will warrant a conviction of larceny, and also of burglary where the larceny is proved to have occurred at the time of the breaking and entry of the house: 6 Cyc. 247, 248; *Malachi v. State*, 89 Ala. 134, 8 South. 104; *Roberson v. State*, 40 Fla. 509, 24 South. 474; *Lester v. State*, 106 Ga. 371, 32 S. E. 335; *Wilson v. United States*, 162 U. S. 613, 16 Sup. Ct. Rep. 895, 40 L. ed. 1090; *Magee v. People*, 139 Ill. 138, 28 N. E. 1077; *State v. Dale*, 141 Mo. 284, 64 Am. St. Rep. 513, 42 S. W. 722. Such evidence raises no presumption of law as to the guilt of the accused, but only warrants an inference of fact, of more or less weight according to the particular circumstances of each case, which the jury may draw therefrom <sup>435</sup> as to his guilt. It makes a question for the jury, and is sufficient to warrant conviction where it induces in the minds of the jury a belief, beyond a reasonable doubt, of the guilt of the accused.

It is urged by counsel that proof of possession of only a part of the property recently stolen is not sufficient to warrant conviction either of larceny or burglary. We find no such distinction either upon principle or in the adjudged cases. The rule is based upon the broad principle that where one is found in unexplained possession of the fruits of crime recently committed, guilty participation in the commission of the crime may be inferred therefrom, and the inference is just as reasonable and natural where only part of the prop-

erty is found in the possession of the accused, as it is where all is found, if it is shown that all the property was taken at the same time. In either case where the possession is not explained, the inference of guilty participation in the commission of the crime may follow.

The instructions of the court declared the law in accordance with the views herein expressed, and we find no error therein. The judgment of conviction of the crime of larceny is affirmed; but the judgment of conviction for burglary is, on account of the insufficiency of the evidence to sustain the verdict, reversed and remanded for a new trial.

Hill, C. J., absent.

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*The Crime of Burglary* is discussed in the note to *People v. Richards*, 2 Am. St. Rep. 383. At the common law, burglary is an offense against the habitation of man: *People v. Richards*, 108 N. Y. 137, 2 Am. St. Rep. 373.

*The Possession of Stolen Property as Evidence of Guilt* is the subject of a monographic note to *State v. Drew*, 101 Am. St. Rep. 481.

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## TEMPLETON v. EQUITABLE MANUFACTURING CO.

[79 Ark. 456, 96 S. W. 188.]

**CARRIERS—Delivery—Title to Goods.**—If a vendor undertakes to make delivery by carrier to a distant place, the carrier becomes the agent of the vendor, and the property and the title thereto do not pass until actual delivery. (p. 90.)

**CARRIERS—Delivery—Title to Goods.**—If goods shipped are to be delivered to a carrier specially designated by the vendee, the carrier becomes the agent of the vendee, and delivery to it is delivery to him, and passes the title. (p. 90.)

**CARRIERS—Delivery—Title to Goods.**—If a contract for the carriage of goods is silent as to the mode of delivery, delivery by a vendor to a carrier in the usual and ordinary course of business constitutes delivery of the vendee, and passes the title. (p. 90.)

**CARRIERS—Delivery—Title to Goods—Rescission.**—If an order for goods directs the vendor to deliver them to a carrier either at a distributing point or at the factory of the vendor, and such goods are delivered at the factory in due course of business and in apt time to a railroad company properly consigned to the vendee, the title passes to him at that time, and a subsequent delay of the carrier in transporting the goods constitutes no ground for a rescission of the contract of purchase. (p. 90.)

**CARRIERS—Nondelivery of Bill of Lading—Title to Goods.—**

If goods are shipped by carrier consigned to the vendee and the bill of lading is not negotiated, the title to the goods passes to the vendee on delivery to the carrier, though the bill of lading is not sent to him. (p. 91.)

F. T. Vaughan, for the appellants.

Boyd & Kerby, for the appellee.

<sup>457</sup> HILL, C. J. The appellee is engaged in the jewelry business, and appellants, Templeton & Adams, are merchants at Kerr, in Lonoke county. Their freight station is the town of Lonoke. The appellee's place of business is Iowa City, Iowa, and its factory is at Alliance, Ohio. Appellee sold appellants a lot of jewelry, and a written contract was entered into between them. One <sup>458</sup> clause is as follows: "On your approval of this order please deliver to us at your earliest convenience f. o. b. transportation companies, either at the distributing point or at the factory point, the above assortment of goods on the terms and conditions herein set forth and no other." The "above assortment of goods" began with: "1 revolving showcase free with the order." The showcase was shown to be a material part of the contract and an inducing element. The goods, except the showcase, were duly received at Lonoke, but appellants would not take them until the showcase came. The uncontradicted evidence is that the showcase was promptly delivered to a railroad company at Alliance, Ohio, the factory point; a bill of lading was issued to the appellee showing the showcase was consigned to the appellants at Lonoke. This bill of lading was not sent to appellants. After waiting more than a reasonable time for the showcase to reach them after the other goods arrived, the appellants had the jewelry shipped back. Later the showcase came, and appellants would not receive it. Appellee did not accept the returned goods, and say they are held subject to appellants' orders, presumably by the express company, as they were returned by express, charges prepaid.

The appellee sued for contract price of the jewelry, one hundred and fifty dollars, and recovered judgment, and appellants bring the case here.

It is seen from the foregoing statement that the only point in the case is whether the delivery of the showcase to the railroad company at Alliance, Ohio, was a delivery to Templeton & Adams. If it was a delivery to them, then appellee

had a right to stand on its contract, and refuse to accept the goods tendered back in rescission of the contract. If it was not a good delivery, then Templeton & Adams were within their rights in rescinding the contract after waiting a reasonable length of time to receive the showcase, a material part of the goods to be furnished under it.

If a vendor undertakes to make delivery to a distant place, the carrier becomes the agent of the vendor, and the property will not pass until actual delivery; if the goods are to be delivered to a carrier specially designated by the vendee, the carrier becomes the agent of the vendee, and delivery to it is delivery to the vendee; if the contract is silent as to the mode of delivery then a delivery by the vendor to a common carrier in the usual <sup>459</sup> and ordinary course of business constitutes delivery to the vendee; where no carrier is specified, and a choice is open to the shipper, the selection of anyone in good faith in the due course of business is sufficient. The effect of the delivery in proper manner to the carrier is to transfer the title and to fix the time and place when the title passes: *Meechem on Sales*, secs. 736, 739. This subject has recently been considered by this court in *Gottlieb v. Rinaldo*, 78 Ark. 123, 93 S. W. 750, 5 L. R. A., N. S., 273, and *Garner v. St. Louis etc. Ry. Co.*, 79 Ark. 353, 96 S. W. 187. This contract specified that the delivery to appellants was to be to a transportation company at appellee's distributing or factory point. The undisputed evidence is that it was delivered at the factory point in the due course of business in apt time to a railroad company properly consigned to appellants pursuant to the direction in the contract. Therefore it follows that the delay in actually receiving the showcase at Lonoke was the delay of the agent of Templeton & Adams, the railroad company, and consequently afforded no cause of rescission against the vendor. Templeton & Adams could have contracted for delivery at Lonoke, and it is probable, judging from their conduct, that they so understood their contract; but it is not so written. Unfortunately for them, they contracted that this delivery should be made to them free on board the transportation companies, either at the distributing point or at the factory point; and that was done, and the default was the default of the railroad after the title of the showcase passed to them.

It is said that appellee did not send appellants the bill of lading, and therefore the title did not pass. The bill of lading should have been sent, but it was not, and Templeton & Adams made no demand for it. It was settled in *Nebraska Meal Mills v. St. Louis etc. Ry. Co.*, 64 Ark. 169, 62 Am. St. Rep. 183, 41 S. W. 810, 38 L. R. A. 358, that a carrier is justified in delivering to the consignee pursuant to the shipping directions in the bill of lading, even though the bill of lading is in fact attached to a draft sent for collection, if the latter fact is not known to the carrier. Under the bill of lading in this case the carrier would have been justified in delivering to Templeton & Adams without forwarding the bill of lading. In other words, the failure to send the bill of lading to Templeton & Adams put no obstacle to the delivery of the goods to them. While a bill <sup>460</sup> of lading is both a receipt and a contract, and is a muniment of title (*Garner v. St. Louis etc. Ry. Co.*, 79 Ark. 353, 96 S. W. 187), yet it had no influence in this case, as the goods were not sent to shipper's order, but consigned directly to Templeton & Adams, and the bill of lading was not negotiated.

The case turns simply on whether the showcase was delivered to Templeton & Adams at Alliance, Ohio, when there delivered to the common carrier. The contract so stipulated, and it is not for the courts to change it.

The judgment is affirmed.

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*When a Vendor of Goods Delivers Them to a Carrier* for transportation to the vendee, the title usually passes to the latter: *Scharff v. Meyer*, 133 Mo. 428, 54 Am. St. Rep. 672, and cases cited in the cross-reference note thereto; *Johnson v. Hibbard*, 29 Or. 184, 54 Am. St. Rep. 787. See, however, *Garner v. St. Louis etc. Ry. Co.*, 79 Ark. 353, ante, p. 83. But if he delivers them to the carrier with directions not to deliver them to the vendee until the purchase money is paid, the sale is not consummated until the condition is complied with: *State v. Wingfield*, 115 Mo. 428, 37 Am. St. Rep. 406.

**STRANGE v. BODCAW LUMBER COMPANY.**

[79 Ark. 490, 96 S. W. 152.]

**HIGHWAYS—Negligence—Liability of Person Building Pond.**

If a pond is constructed by a private person beside a highway, and the horse of another is drowned therein, the right of its owner to recover does not depend upon the condition of the highway itself, and in order to recover he must show that the water which such person placed around and against the highway was so dangerous to travel that barriers were necessary to protect the public against the danger, and that the failure of the defendant to erect them caused the injury. (p. 94.)

**HIGHWAYS—Negligence—Obstructions or Excavations.—**

If it is unlawful to make an excavation or to put a dangerous obstruction of any kind adjoining a public highway and leave it in a condition to endanger the safety of those who are traveling thereon, and who themselves are in the exercise of ordinary care. A person making such excavation must exercise due care to protect the public against danger from accidents caused thereby, and if necessary erect a fence or guard rails for that purpose. (p. 95.)

**HIGHWAYS—Negligence—Pond Adjoining Highway.—**

A person who causes a deep pond to be constructed adjoining a highway either by making an excavation or constructing a dam, must erect barriers or guard-rails, or do whatever may be necessary to protect the public against the danger he has created as to them while traveling upon the highway in the exercise of ordinary care, and failing in this duty he is liable for injury to such traveler or to his property unless the latter is guilty of contributory negligence. (p. 95.)

**HIGHWAYS—Negligence—Pond Adjoining Highway.—**

If a deep pond is constructed adjoining a public highway, and a horse driven along such highway is drowned in the pond, it is no defense for the person constructing the pond that it was placed there by permission of the county judge, who had no power to authorize acts dangerous to the public, nor relieve the defendant from the consequences of his own negligence. (p. 96.)

**HIGHWAYS—Negligence—Pond Adjoining Highway.—**

If a person constructs a deep pond adjoining a highway and a horse is drowned therein, it is no defense that such person had no authority to enter the highway to erect guard-rails or barriers. (p. 96.)

**HIGHWAYS—Pond Adjoining Highway—Concurrent Causes of**

**Injury.**—If a horse, while being driven along a public highway, becomes frightened at goats thereon, and backs off the highway and is drowned in a deep pond constructed and unguarded by an adjoining land owner, the latter cannot escape liability on the ground that the accident would not have happened if the horse had not thus become frightened. (p. 97.)

**TRIAL—Instructions.—**

The fact that matters of evidence and other unnecessary allegations are set out in the complaint does not justify the court in instructing the jury that such allegations must be proved, especially when they are immaterial. (p. 98.)

Searcy & Parks and W. E. Atkinson, for the appellant.

Moore & Moore, for the appellee.



<sup>491</sup> REDDICK, J. The facts in this case are stated in the opinion. On the trial the circuit judge gave among other instructions the following over the objection of the plaintiff, and to the giving of each of which the plaintiff duly saved exceptions at the time:

"5. The jury are instructed that, though they should believe from a preponderance of the evidence that there were defects in said roadway, and that the alleged accident was rendered possible thereby, yet, if they believe that the proximate cause of said accident was that said horse became frightened at a pair of goats driven to a sled by one Leo Couch, and that, but for said horse <sup>492</sup> becoming so frightened at said goats so driven to a sled, said accident would not have happened, your verdict should be for the defendant."

"7. The jury are instructed that if they believe from a preponderance of the testimony that the roadway where said accident is alleged to have happened was in a reasonably good and safe condition, and that, but for the fact that said horse became frightened at the pair of goats and sled driven by Leo Couch, said horse and buggy would have gone safely over said roadway without accident, then their verdict should be for the defendant."

<sup>493</sup> This is an action by F. A. Strange against the Bodcaw Lumber Company to recover one hundred dollars of the company as damages for causing the death of plaintiff's horse.

The company owns a sawmill plant near the town of Stamps in Lafayette county of this state. The town was west of the mill plant, and a public road that entered the town from the east passed not far from the mill and crossed a small stream called Crooked creek before reaching the town. In 1893 the lumber company made a large pond by constructing a dam across the valley of this creek. The public road crossed the road above where the dam was constructed. To prevent the water from overflowing the public road, the road was straightened, and a roadbed several feet high was constructed across the valley of this stream with a bridge across the channel of the creek. This work was done by the lumber company with the consent of the county judge and with the assistance of the road overseer. This elevated roadbed was about twenty feet wide, and near the creek was over ten feet high. After the company had erected its dam across the creek the water backed up around this public road, and at places was eight

or ten feet deep on both sides of the road. When the roadbed was first constructed, posts with connecting rails were placed along the edge of the roadbed to prevent wagons and teams from running off the dump into the pond. But, as the roadbed was raised from time to time by placing loads of <sup>494</sup> dirt and sawdust thereon, the surface of the roadbed was finally raised about the rails, so that nothing but the posts were left above the surface of the roadway. After this roadbed was constructed, it was under the control of the road overseer as one of the public roads of the county until, by an extension of the limits of the town of Stamps, it came within the limits of the town, and passed to the control of town authorities as a public street.

On the 5th of September, 1904, while this road or street was in this condition, Alvin Strange, a brother of the plaintiff, drove the horse of plaintiff to the town of Stamps to attend services at a church. In the buggy with him were his sister and another young lady. It was night, and while they were crossing this road and approaching the bridge over the creek the horse became frightened at a pair of goats hitched to a sled which a boy had driven upon the bridge. The horse, on being frightened by the goats, began to back, and before he could be stopped he backed the buggy over the side of the roadbed into the water, which was at that place about ten feet deep. The occupants of the buggy got out and escaped, but the horse was drowned. The plaintiff, as the owner of the horse, brought this action against the mill company, as before stated, to recover damages for the death of his horse. The jury returned a verdict for the defendant, and judgment was rendered accordingly, and the appeal taken by the plaintiff brings the case before us for review.

We will state at the outset that the defendant cannot be held responsible for the condition of the roadway itself. It cannot be held responsible for the fact that the road at this point was elevated on an embankment several feet high, for this was a public road, and defendant had no right to reduce the height of this embankment or to change it. In order for the plaintiff to recover, he must show that the water which defendant placed around and against this road was so dangerous to travel that barriers were necessary to protect the public against the danger, and that the failure of the defendant to erect them caused the injury.

The law is now well settled that it is unlawful to make an excavation or to put a dangerous obstruction of any kind adjoining <sup>495</sup> a public highway, and leave it in a condition to endanger the safety of those who are traveling thereon and who themselves are in the exercise of ordinary care. When one makes an excavation of that kind on his own grounds adjoining the public highway, he should exercise due care to protect the public against the danger to accidents caused by such excavations, and, if necessary, should erect a fence or guard-rails for that purpose. This question was discussed and the law clearly stated in the case of Beck v. Carter, 68 N. Y. 283: See, also, Barnes v. Ward, 9 Com. B. 392; Hadley v. Taylor, L. R. 1 C. P. 53; 1 Wood on Nuisances, 3d ed., sec. 271, and cases cited.

The rule would be the same if one, after making an excavation adjoining the public highway, should fill it with water, and thus make a deep pond adjoining the highway. If such pond was dangerous to travelers on the highway who were exercising ordinary care, it would be the duty of the owner to erect barriers or guard-rails or do whatever might be necessary to protect the public against the danger he had created. And his duty would be the same whether the pond was caused by making an excavation adjoining the highway and filling it with water, or by damming a stream which crossed the highway, thus causing the water to back up on both sides of the highway. In either case it would be his duty to so exercise his own rights as to avoid injury to the public; and if the danger was such that it could be foreseen that a fence or railing was required to guard the public against danger, it would be the duty of the owner to put them up.

Now, in this case it is admitted that the defendant constructed an embankment across a stream, and thus backed up the water on both sides of the public highway where it crossed the valley of the stream. If the presence of this water added nothing of danger to travelers on the highway who themselves exercised ordinary care, then the defendant was guilty of no wrong, and was not responsible for this injury. But if the water made the road more hazardous to travelers, it became the duty of the defendant company to do what was reasonably necessary to guard the public against danger caused by this act of damming the stream. If the danger was such

that guard-rails were required to protect travelers, they should not only have been provided, but kept in repair so as to serve the purposes intended. And if, by reason of the <sup>496</sup> failure of the company in this respect, a traveler along the public highway or his property was injured, the traveler or owner of the property can recover damages for the injury unless his own carelessness, or that of his agent in charge of the property, contributed to the injury.

The case then turns first on the question of whether the presence of this water on either side of the public road was a source of danger to travelers on the highway who themselves exercised due care. If this was so, it was the duty of the company to erect guard-rails or do whatever was reasonable and necessary to protect the public against the danger; and if it failed to do so, and by reason of such negligence the plaintiff's horse was drowned, the company is liable, unless the driver of the horse was guilty of negligence contributing to the injury.

The fact that the pond was put there by permission of the county judge does not alter the case, for the permission of the county judge cannot authorize acts dangerous to the public, nor relieve the defendant from the consequences of its own negligence. Nor is it any defense for defendant to say that it had no authority to enter on the public highway to erect guard-rails or barriers. If the danger to travel on the highway from this pond was of such a nature as to make it necessary to erect barriers to protect the public from danger, then the defendant would either have to erect the barriers or drain the pond. But it is not shown that it applied for permission to erect barriers, nor is there any ground to believe that a request of that kind would have been denied had it been made to the proper authorities, so we need not speculate upon what would have been the position of defendant if, before the accident happened, it had applied for permission to erect barriers between the pond and the highway, and this permission had been refused.

The instructions given by the court at the request of the plaintiff were somewhat too stringent, for, if the pond was shown to be dangerous to travel, the instructions declared as a matter of law that the defendant should erect guard-rails while in our opinion if the pond was dangerous to travel on the highway the defendant was then required to do so.

was reasonably necessary to protect the public from this danger, and it was for the jury to say whether, under the circumstances, guard-rails should <sup>497</sup> have been erected or not, and whether such injury might have been foreseen and avoided.

On the other hand, the fifth instruction and other instructions given at the request of the defendant were too favorable to defendant, for they told the jury that if the proximate cause of the accident was that the horse became frightened at a pair of goats hitched to a sled, and that, "but for said horse becoming frightened at the goats driven to the sled, the accident would not have happened," they should find for defendant. As the undisputed evidence shows clearly that the accident would not have happened but for the fact that the horse became frightened at the goats, this fifth instruction was virtually an instruction to find for the defendant. The fact that the horse became frightened at the goats was no doubt one cause of the injury, but that did not necessarily relieve the defendant from liability. The horse did not run away. He began to back and became to a certain extent uncontrollable, but he did not get completely beyond the control of the driver until the buggy was backed over the edge of the roadway and went into the pond, dragging the horse after it. Horses, when frightened, often back away from the object that alarms them, but on being encouraged by their driver frequently regain their composure and move on again. So, under the facts of this case, it was for the jury to say whether, if there had been guard-rails or something to prevent the buggy from going into the pond, this accident would have happened. If, notwithstanding the fright of the horse, the accident would not have happened if there had been guard-rails, and if the absence of guard-rails was due to the fault of the defendant, then its negligence as well as the fright of the horse is a proximate cause of the injury. If that was so, then, as the plaintiff was not responsible for the presence of the goats on the bridge, or the fright of the horse, he can recover if the driver in charge of the horse was guilty of no negligence contributing to the injury. We are therefore of the opinion that the fifth instruction and some of the other instructions given for the defendant were misleading and erroneous: *St. Louis etc. Ry. Co. v. Aven*, 61 Ark. 141, 32 S. W. 500.

Counsel for the defendant have cited *Hill v. New River*, 9 Best & S. 303, and other cases which hold under similar instructions that no recovery can be had, for the reason that the fright of the <sup>498</sup> horse, and not the absence of barriers is the proximate cause of the injury. But these cases were considered by this court in case of *St. Louis etc. Ry. Co. v. Aven*, 61 Ark. 141, 32 S. W. 500, where it was held that the fright of the horse and the absence of barriers were both causes directly contributing to the injury; and if one of these contributing causes was due to the fault of the defendant, the plaintiff could recover for the injury caused thereby when he himself was free from negligence. This case is stronger for the plaintiff for the reason that the horse was not in this case running away nor completely beyond the control of the driver, but was only backing away from the object that alarmed him.

The first instruction given for the defendant was too long and involved, and submitted questions to the jury, some of which were not controverted, and others immaterial. It is true that there was some excuse for this instruction, in that it followed, to some extent, the statement in the complaint which contains a number of allegations which were unnecessary to make in the complaint. The complaint should allege the substantive or issuable facts, and it is unnecessary to set out the evidence, or a history of the transactions leading up to the essential or issuable facts: *Bliss on Code Pleading*, 3d ed., sec. 206. But the fact that matters of evidence and other unnecessary allegations were set out in the complaint does not justify the court in telling the jury that such allegations must be proved when they are immaterial. Among other allegations which the instruction told the jury that the plaintiff must prove to make out his case was that "the defendant erected across the stream and overflowed ground a bridge and dump and roadway," and continued up to the time of the accident "to maintain and have supervision in the keeping up of said dump and highway," etc. But this was not correct, for the right to recover in this case depended not on whether the defendant constructed and maintained this roadway, but on whether it, by banking this water around a public highway, created a danger to the public, and the defendant negligently failed to take proper precautions to guard the public against injury.

For the errors indicated, the judgment is reversed and cause remanded for a new trial.

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*The Liability of Owners of Land who leave ponds of water unguarded near a highway is considered in Cooper v. Overton, 102 Tenn. 211, 73 Am. St. Rep. 864; Moran v. Pullman etc. Car Co., 134 Mo. 641, 56 Am. St. Rep. 543; Lepnick v. Gaddis, 72 Miss. 200, 48 Am. St. Rep. 547; Horstick v. Dunkler, 145 Pa. 220, 27 Am. St. Rep. 685. And their liability for leaving excavations unguarded near the highway is considered in Overholt v. Vieths, 93 Mo. 422, 3 Am. St. Rep. 557; Butz v. Cavanaugh, 137 Mo. 503, 59 Am. St. Rep. 504; Daneck v. Pennsylvania E. R. Co., 59 N. J. L. 415, 59 Am. St. Rep. 613.*

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## ARKANSAS & TEXAS GRAIN COMPANY v. YOUNG & FRESCH GRAIN COMPANY.

[79 Ark. 603, 96 S. W. 142.]

**SALES—Waiver of Breach of Contract.**—If, under a contract for the purchase of corn to be delivered to a carrier for transportation to the vendee, the vendor's liability was to cease when the corn was delivered in good condition to the carrier and he was not thereafter to become liable for loss if the corn became heated, the fact that he granted permission to the vendee to inspect the corn at its destination before acceptance does not amount to a waiver of his right to claim damages for the wrongful rejection of the corn by the vendee on the ground that it became heated after delivery to the carrier. (p. 100.)

**SALES—Waiver of Breach—Resale.**—If, after a vendee has committed a breach of his contract to purchase goods, the agent of the vendor resells them to him at a reduced price, the vendor does not thereby waive the right to claim as damages the difference between the contract price and the price received on the resale. (p. 100.)

**SALES—Breach of Contract—Notice of Intent to Resell.**—If, after the vendee's breach of a contract to purchase goods, they are resold to him at a reduced price, no notice to him of an intention to resell is necessary, in order to entitle the vendor to recover the difference between the contract price and the price received on the resale. (p. 101.)

L. A. Byrne, for the appellant.

W. H. Arnold, for the appellee.

<sup>904</sup> RIDDICK, J. This is an appeal by the Arkansas & Texas Grain Company from a judgment rendered against it in favor of the Young & Fresch Grain Company for damages for breach of a contract to purchase two carloads of corn. The corn was shipped from St. Louis to defendant at Tex-

arkana. The defendant, on arrival of the corn at Texarkana, refused to accept it unless first allowed to inspect it. The permission was granted, and defendant, after inspecting the corn, rejected it. Thereupon <sup>605</sup> plaintiff sent an agent from St. Louis, who took charge of the corn and resold it to defendant for a lower price, defendant having offered the best price that could be obtained in that market. But the corn had become heated and injured after shipment, and by reason of the refusal of defendant to accept, and the consequent delay, the corn had sustained further injury, and the price received was below the contract price, and plaintiff brought this action to recover the difference. The case was submitted to the court sitting without a jury, and he found that the corn was of the kind ordered by defendant, and that it was in good condition at the time it was delivered to the railway company in St. Louis. The court further found that one of the conditions of the sale was that the liability of the plaintiff to defendant should cease when the corn was delivered in good condition to the railway company for transportation to Texarkana, and that by the terms of the contract the plaintiff was not responsible for the heating of the corn after delivery to the carrier. He therefore found in favor of plaintiff, and gave judgment against defendant for the sum of one hundred and eighty dollars.

The evidence was sufficient to support the finding made by the court, which, like the verdict of a jury, is conclusive on questions of fact upon which the evidence is conflicting. Nor do we find any error of law that requires a reversal of the judgment. The contention of appellant that the permission to inspect the corn included the right to reject cannot be sustained. Plaintiff granted the right to inspect after the corn had already arrived at Texarkana because defendant refused to accept unless inspection was granted. This was done in an effort to induce defendant to accept the corn, and does not amount to a waiver of the right of plaintiff to claim damages for wrongful rejection: *Riendeau v. Bullock*, 147 N. W. 269, 41 N. E. 561.

Neither did the fact that the agent of plaintiff came down to Texarkana and resold the corn to defendant amount in itself to a waiver of that right. It was his duty to obtain the best price possible; and as the best offer came from defendant, plaintiff did right in accepting the offer. The circuit



stances in proof justified the circuit court in finding that there was no waiver by plaintiff of the original contract, nor of its right to seek damages for breach of the contract: *Rien-deau v. Bullock*, 147 N. Y. 269, 41 N. E. 561; <sup>606</sup> *Lewis v. Greider*, 51 N. Y. 231; *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271; *Benjamin on Sales*, Bennett's ed., 826. As the resale of the corn was made to the defendant company, there was no necessity to give formal notice of the intention to resell. Under such circumstances the defendant could be in no way injured by the want of such notice: *Benjamin on Sales*, Bennett's ed., 826; *Holland v. Rea*, 48 Mich. 218, 12 N. W. 167; *Clore v. Robinson*, 100 Ky. 402, 38 S. W. 687.

On the whole case, we are of the opinion that the judgment should be affirmed, and it is so ordered.

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*A Vendor of Personal Property*, when the vendee declines to take and pay for it, ordinarily has the choice of any of three methods of indemnifying himself against loss. He may store or retain the property for the vendee and sue him for the entire price; he may sell the property and recover the difference between the contract price and the price obtained on the resale; or he may keep the property as his own, and recover the difference between the market value at the time and place of delivery and the contract price: *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692; *Huguenot Mills v. Jempson*, 68 S. C. 363, 102 Am. St. Rep. 673; *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 94 Am. St. Rep. 112; *Thick v. Detroit etc. Ry. Co.*, 137 Mich. 708, 109 Am. St. Rep. 694.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ILLINOIS.**

**CHICAGO AND ALTON RAILWAY COMPANY v. WILSON.**

[225 Ill. 50, 80 N. E. 56.]

**EVIDENCE—Exercise of Due Care.**—If there is no eye-witness to a fatal accident at a railway crossing, evidence that the deceased was a woman of careful habits is competent as tending to show that she was at the time in the exercise of due care. (p. 104.)

**EVIDENCE—Exercise of Due Care.**—Due care may be shown by circumstances as well as by direct testimony, and the fact that the deceased, at the time of the accident, was not guilty of negligence, may be shown by her habits and by what are known to be the instincts of self-preservation in persons possessed of their natural faculties and who are ordinarily sober, and careful of their personal safety. (p. 104.)

**EVIDENCE—Exercise of Due Care.**—Evidence of the careful habits of a person killed at a railroad crossing is not rendered incompetent by the subsequent testimony of the train engineer that he saw the deceased when she was within a few feet of the track; that upon sounding the alarm she stopped; that he did not know of her being struck, did not stop his train, and only heard of the fatal accident the next morning. (p. 104.)

**EVIDENCE—Proof of Ordinances.**—A book of ordinances purporting to be printed by authority of a municipal corporation is only prima facie evidence of their passage. (p. 105.)

**EVIDENCE—Proof of Ordinances.**—After a prima facie case of the passage and publication of an ordinance has been made out by introducing in evidence a book of ordinances purporting to have been printed by municipal authority, it is not sufficient to overcome such case to cast doubt or suspicion upon the validity of such ordinance, and to be successful its validity must be disproved by showing that, as a matter of fact, it was never passed. (p. 106.)

J. L. O'Donnell, T. J. Donovan and Winston, Payne  
Strawn, for the appellant.

C. F. Hanson and Brown & Wiley, for the appellee.

<sup>51</sup> WILKIN, J. This is an appeal from a judgment of the appellate court affirming a judgment of the circuit court of Grundy county in favor of appellee, against appellant, in an action on the case for wrongfully causing the death of the plaintiff's wife, Anna Wilson. The declaration consisted of four counts. The first charged defendant with running one of its passenger trains through the village of Braceville, in said county, and across its streets, at a dangerous rate of speed, whereby the deceased, while exercising due care in crossing the said railroad track on Main street, in said village, was instantly killed. The second count charges the defendant with running a passenger train across said Main street without ringing a bell or sounding a whistle in approaching said crossing, as required by the statute, whereby the said Anna Wilson, while in the exercise of due care, was run over and killed. The third and fourth counts allege a violation of an ordinance of the village of Braceville by the defendant in running <sup>52</sup> its train through said village at a greater rate of speed than permitted by said ordinance. The plea was not guilty, and upon the trial before a jury judgment was rendered for the plaintiff. The verdict was for three thousand five hundred dollars, but five hundred dollars of that amount was remitted and judgment entered for the balance.

The defendant's railroad runs through the village of Braceville from northeast to southwest, crossing Main and Mitchell streets. The deceased lived on Main street, on the south side of the tracks, and on Saturday evening, October 24, 1903, she left her home and walked west on Main street, crossing the tracks, to a grocery store on the northeast corner of Main and Mitchell streets to purchase family provisions. After making the purchases she started back home, passing east along the north side of Main street. About the time she left the store one of the defendant's trains, known as the "Kansas City Hummer," passed in a southwesterly direction. No one saw the train strike her, and it was not known that she had been killed until the next morning, when her body was found east of the track and about seventy-five feet south of the crossing. The evidence is conflicting as to the rate of speed at which the train was running at the time it crossed Main street, some of the plaintiff's witnesses fixing it at from fifty to sixty miles an hour, while the en-

gineer in charge of the train swore that he was running about thirty-five or forty miles per hour. The evidence as to whether any signal was given upon approaching the crossing is also contradictory. Several citizens who saw the train pass testify that no bell was rung nor whistle sounded, while the engineer and fireman testified to the contrary. The circumstances proved satisfactorily show that the deceased was killed by that evening train. There can be no doubt that the evidence upon these counts was amply sufficient to justify the court in refusing, at the instance of the defendant, to instruct the jury to find for it, nor that, in view of the conflict in the evidence on these counts, the judgment of the appellate court is final and conclusive in favor of the plaintiff.

<sup>53</sup> The contention that evidence introduced on behalf of the plaintiff as to the careful habits of the deceased was incompetent and improperly admitted over the defendant's objection is without force. As we have already stated, no one witnessed the accident, and the testimony objected to was competent as tending to show that the deceased was at the time in the exercise of due care. Due care may be shown by circumstances as well as by direct testimony, and the fact that the deceased, at the time of the accident, was not guilty of negligence may be shown by her habits and by what is known to be the instincts of self-preservation in persons possessed of their natural faculties and who are ordinarily sober and careful of their personal safety: *Chicago etc. R. R. Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708; *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435. It seems to be claimed on behalf of appellant that the evidence of the engineer in charge of the train is to the effect that he saw the accident, and therefore the evidence introduced on behalf of the plaintiff as to the careful habits of the deceased became incompetent. At the time plaintiff's evidence was offered the engineer had not testified. If it was insisted that his evidence rendered that of plaintiff incompetent, counsel for defendant should have moved to exclude plaintiff's testimony, but this was not done. But the evidence of the engineer did not render the testimony incompetent. He did not claim to have seen the accident, but simply testified that he saw a woman approaching the crossing and saw her within a few feet of the east rail of the track, and that upon sounding the alarm she stopped, and that he did not know of her being

struck, did not stop the train, and only heard of the fatal accident the next morning. We do not think the trial court was in error in admitting the testimony.

It is earnestly insisted on behalf of the appellant that the trial court erred in admitting in evidence proof of an ordinance of the village of Braceville regulating the speed of trains within its corporate limits. This proof on behalf of <sup>54</sup> the plaintiff consisted of a book or pamphlet of ordinances purporting to have been printed by authority of the village board. Treating that proof as prima facie evidence of the passage and publication of the ordinance, the defendant attempted to overcome the same by introducing the journal of the proceedings of the village board. It is not denied, as we understand, that the proof offered by the plaintiff, under the provisions of section 65 of the city and village act, was competent and in every way fulfilled the requirements of that section of the statute. Counsel for appellee insisted that such proof not only proved prima facie the legal passage and publication of the ordinance, but that such proof was conclusive and could not be contradicted by the defendant. In this we think they are in error. While the statute makes such proof competent, we do not understand that it may not be contradicted by other competent evidence showing that the ordinance was never, in fact, legally passed. The evidence seems to have been introduced in an irregular manner. It appears that after the plaintiff had made his proof, as above stated, the jury were sent out and the defendant offered to the court proof to indentify the journal of the proceedings of the village board and then offered that book in evidence, and especially pages 278 to 286, inclusive, showing proceedings at meetings of the village trustees on February 2 and February 9, 1885, which, it is claimed, shows that no meeting was held on February 4, 1885, and that the revised ordinances were adopted on February 2, 1885, and that chapter 30 thereof, as adopted, was upon the subject of rules, and not of railroads, as appeared from the printed book of ordinances. The journal shows a meeting of the village board convened on February 2, 1885, for the purpose of considering the revised ordinances; that all the members were present, and that a motion was carried to take up and adopt the ordinances chapter by chapter. It then gives the number of each chapter, beginning with chapter 1, and in most in-

stances enumerates the number of each section in that chapter. <sup>55</sup> It gives the yeas and nays upon the adoption of each chapter and shows each chapter adopted. In a few cases the number of sections in a chapter is not given. After the adoption of chapter 1 an adjournment to 1 o'clock is shown. There is no reference in this journal to chapter 15, but chapter 16 follows immediately after chapter 14, and the enumeration then proceeds in regular order. This makes the chapter 39, whereas there are only chapters 1 to 38, inclusive, in the published book. But, as a matter of fact, there are only thirty-eight chapters shown to have been adopted by the journal. The only case in which the journal shows the subject of the chapter is chapter 30, which, according to it, related to rules, while in the printed book chapter 30 relates to railroads and chapter 31 to rules. The number of sections in a chapter bearing a given number, as stated in the journal, does not always agree with the number of sections in the chapter bearing that number in the printed book. The error in omitting to number chapter 15 in the journal does not explain all the apparent discrepancies. At the close of the proceedings is a unanimous vote in favor of the report of the committee, which, fairly, means the adoption of all ordinances as an entirety. We think the appellate court properly held that the journal offered in evidence by the defendant did not disprove the passage of the ordinance, but, at most, merely tended to show that the records of the village board were incorrectly or carelessly kept, the burden being upon the appellant to overcome the prima facie case made by the plaintiff. It was not sufficient for it to merely cast doubt or suspicion upon the validity of the ordinance, but to disprove its validity by showing that, as a matter of fact, it was never passed. If regularly passed, the fact that the journal incorrectly gave the date of its passage or the title of the chapter in which it was included would not render it invalid.

Again, the village clerk, as shown by his testimony introduced before the court, shows that he had only been in office about one year, and while he testified that the book offered <sup>56</sup> as the journal was the only record of the proceedings of the board of trustees, he also stated, on cross-examination, that he was not certain as to that fact, and it can readily be seen that without a special examination of the books kept

by his predecessor or predecessors he would have no more knowledge as to whether the journal in question was the only record of the proceedings than would any other person, and he testified that he had made no such examination. Section 11 of article 6 of the city and village act provides that the clerk shall record in a book to be kept for that purpose all ordinances passed by the board of trustees, and at the foot of the record, on each ordinance so recorded, he shall make a memorandum of the date of the passage and of the publication or posting of such ordinance, which record and memorandum, or certified copy thereof, shall be prima facie evidence of the passage and legal publication or posting of such ordinances for all purposes whatsoever. There is an entire absence in this record of proof of a failure of the clerk to comply with this provision of the statute, and the presumption must be that he did his duty and recorded the ordinance as passed. If he performed his duty in that regard his certificate would be prima facie evidence of the passage of the ordinances. The proof, therefore, introduced before the court did not show that the revised ordinances as published were not passed as shown in the pamphlet introduced in evidence by the plaintiff.

The method of introducing the evidence on this question was peculiar. As heretofore stated, all the proof offered by the defendant was to the court, out of the hearing of the jury. During that hearing before the court certain oral testimony was offered by the plaintiff to explain the passage of the ordinances and the apparent contradiction in dates, numbers and titles of the chapters of the ordinances. This testimony, in part at least, if it had been admitted to the jury by the plaintiff over the objection of the defendant, would have been incompetent, though, in so far as it did not contradict <sup>57</sup> the record but simply explained it, it may not have been objectionable. But aside from the consideration of that question of its competency, after the jury were returned into court and the plaintiff renewed his offer of the book of ordinances, the defendant renewed its objection, and the abstract recites that it, "in support of the objections, offers all the evidence heretofore offered to the court therein," so that if the oral testimony went to the jury at all it must have been at the instance of the defendant, and it cannot therefore now

object. However, that testimony, in any view of the case, was not of such controlling importance as that it ought to work a reversal of the judgment below.

The circuit and appellate courts did not commit error in holding that plaintiff proved the passage and publication of the ordinance regulating the speed of the trains through the village and that the defendant failed to overcome that proof, and that no reversible error was committed in the admission of oral testimony.

Some objection was made in the appellate court of the ruling of the trial court in admitting in evidence on behalf of the plaintiff certain photographs, but that objection does not seem to be renewed here.

The contentions that the evidence shows that the deceased was guilty of contributory negligence, and that the damages allowed are excessive, cannot be considered in this court. The judgment of the appellate court is final as to these facts.

We have discovered no reversible error in this record, and the judgment of the appellate court will be affirmed.

Farmer and Vickers, JJ., took no part in the decision of this case.

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#### **WHEN THE EXERCISE OF CARE WILL BE PRESUMED.**

- I. Scope of Note, 109.**
- II. Presumption of Due Care.**
  - a. In General, 109.**
  - b. Rule as Applicable to Children or Minors, 114.**
- III. Effect of Rule as to Burden of Proving Contributory Negligence upon the Presumption of Due Care, 115.**
- IV. How the Presumption may be Ordinarily Overcome, 117.**
- V. Existence of the Presumption Where There is No Eye-witness to the Accident or Any Direct Evidence as to Its Circumstances, 118.**
- VI. Effect Where There is Direct Evidence Indicating Want of Care, 120.**
- VII. Application of the Presumption of Due Care to Railroad Accidents.**
  - a. Where Person is Killed While Walking Along a Railroad Track, 121.**
  - b. Where Accident has Happened at a Railroad Crossing.**
    - 1. General Rule Respecting the Presumptions of Care at Such Crossings, 121.**
    - 2. Presumptions Respecting the Duty to Look and Listen at Such Crossings, 125.**
    - 3. Rule Where had the Deceased Looked and Listened He Would have Seen and Heard the Approaching Train, 126.**



### I. Scope of Note.

The subject of this note may, in a general way, be said to be complementary to the monographic note on the presumption of negligence from the happening of an accident causing personal injuries, which is attached to *Cincinnati Traction Co. v. Holzenkamp*, 13 Am. St. Rep. 986. The decisions which bear directly upon the subject are not as numerous as might be expected, since the question is often tacitly decided by the court holding that a presumption of negligence has arisen or by the decision of the court upon the question as to whether the plaintiff or the defendant is to sustain the burden of proof of contributory negligence.

### II. Presumption of Due Care.

a. In General.—The terms “due care” and “reasonable care” are used by the courts synonymously: *Chicago etc. R. Co. v. Yorty*, 158 Ill. 321, 42 N. E. 64; *Baltimore etc. Ry. Co. v. Faith*, 175 Ill. 58, 51 N. E. 807; *Fletcher v. Boston etc. R. Co.*, 1 Allen, 9, 79 Am. Dec. 695; *Butterfield v. Western R. Corp.*, 10 Allen, 532, 87 Am. Dec. 678.

“Due care may be shown by circumstances as well as by direct testimony, and the fact that the deceased, at the time of the accident, was not guilty of negligence may be shown by her habits and by what are known to be the instincts of self-preservation in persons possessed of their natural faculties and who are ordinarily sober and careful of their personal safety”: *Chicago etc. Ry. Co. v. Wilson*, 225 Ill. 50, ante, p. 102, 80 N. E. 56.

Though the decisions which announce the rule in express words are not numerous, still the weight of authority holds by implication that every person is presumed to have been in the exercise of due care, even though an accident has happened, unless the accident is one of that character of which the mere happening raises a presumption of negligence on the part of the defendant: Monographic note to *Cincinnati Traction Co. v. Holzenkamp*, 113 Am. St. Rep. 986. The presumption of due care necessarily arises by implication in those cases involving the burden of proof with respect to contributory negligence. We will discuss those cases in a subsequent subdivision. Our views on this subject were well expressed in the note to *Farish v. Reigle*, 62 Am. Dec. 687, wherein it was said: “The better authority certainly is that contributory negligence is a matter of defense. If the plaintiff by his allegations admits a clear case of contributory negligence in his complaint, this would undoubtedly be sufficient to establish it. Otherwise, however, the burden should be upon the carrier to prove the defense of contributory negligence. For it is certainly a presumption of fact or common sense that persons are ordinarily prudent. In fact, the very phrases which obtain in legal terminology of ‘ordinary prudence or care’ or ‘the care ordinarily exhibited by persons reasonably prudent under the same circumstances,’ convey with them and are based upon the supposition that people,

as a general rule, are ordinarily careful. Whereas the authorities that render it necessary for the plaintiff to free himself from negligence in the first place seem necessarily to assume that people are usually negligent. The anomaly of requiring the party holding the affirmative to negatively prove a part of his case is apparent, with the necessarily attendant presumption of the negligence of mankind in general requires for its support the mind of a cynic or a pessimist.

The view just quoted was commented upon by Mr. Beach in his valuable work on Contributory Negligence, at page 428, wherein he set forth the arguments which are generally urged in support of the opposing view. After quoting the above extract from the note referred to, he said: "It is upon this key that all the objections to the rule which puts the burden of proof upon the plaintiff in these cases proceed. But such an objection begs the question and is founded upon a wholly unwarranted assumption. The question of the carefulness and prudence of mankind in general is not involved. The question of contributory negligence affects only the few who get hurt in their persons or property by reason of some other person's neglect. Uncounted millions of the human family are born, and live out their allotted span, and die, and bring no single action of negligence in the days of their life. With them and their care or carelessness have nothing to do, except that from their conduct, on the average, we get a meaning for those phrases that Mr. Freeman quotes. 'Ordinary care,' it seems hardly necessary to say, means the care of the average prudent man who does not get hurt in his person or property. By the supposed conduct under given circumstances we test the propriety and fitness of the conduct of a man who has suffered an injury and brings an action for redress. Now, the precise question is not whether the race is upon the whole a careful race, but whether the few out of the multitude who suffer injuries are, upon the whole, careful and prudent. Dividing the human family into the injured and the uninjured, and subdividing the first class into those who bring and those who do not bring actions in courts of justice for the redress of their injuries, we inquire whether that class of the injured who bring suits for damages are, upon the average, careful and prudent men and women. Perhaps it may not seem to involve any revolting amount of cynicism to take the ground that this class of persons are not, upon the whole, or in a majority of cases, up to the average in point of carefulness and prudence, or were not, at the time of the happening of the injury of which they complain, in full exercise of that quantum of care and prudence that passes among men as 'ordinary care'; that it is a fair presumption in any given case that the injured person was at fault, and that the rule that imposes upon such plaintiffs the burden of showing themselves free from contributory negligence is, in a vast majority of cases, shown to be a reasonable rule of law, by the fact that, in a vast majority of cases, it turns out that the plaintiff was in fault, and, in fact, a joint author of the

jury of which he complains. It may even seem, after a full consideration, that the rule which would make contributory negligence a matter of defense, and something in every instance for the defendant to allege and prove, is grounded more in a sentiment than in right reason."

The learned author, however, has failed to consider the fact that the real purpose for which the rules affecting the burden of proof in personal injury cases are created is to aid in ascertaining whether a recovery should or should not be allowed in such cases. The mere fact that a portion of the people who are injured are guilty of contributory negligence does not furnish any new cogent reason for declaring that every person injured should be presumed to be guilty of contributory negligence than does the fact that in the remainder of the cases the defendant is guilty of negligence and the plaintiff free from contributory negligence furnish a reason that the mere happening of the accident should raise a presumption of negligence in all cases, or in fact raise any presumption whatsoever. The mere fact that a portion of the people who are injured by accidents are injured through their own contributory negligence merely goes to show that a small portion of mankind are injured through their own negligence, while the portion who are not injured through their own negligence may be added to that vast majority of mankind who are in the habit of exercising ordinary care in their various acts or vocations.

It has been said that the legal presumption is that men will obey the law and discharge their duties, and that this is the only practicable foundation for rational action or expectation: *American Bridge Co. v. Seeds*, 144 Fed. 605. The question whether due care was or was not used must be determined by the precedent facts and attendant circumstances, and not from what subsequently occurs: *Terre Haute etc. R. Co. v. Clem*, 123 Ind. 15, 18 Am. St. Rep. 303, 23 N. E. 965, 7 L. R. A. 588.

But a servant may ordinarily assume that the master has done his duty in making the machinery, tools or appliances which he is to use reasonably safe for the purpose for which they were intended: *Louisville etc. R. Co. v. Hawkins*, 92 Ala. 241, 9 South. 271; *Louisville etc. R. Co. v. Baker*, 106 Ala. 624, 17 South. 452; *Denver etc. R. Co. v. Smock*, 23 Colo. 456, 48 Pac. 681; *Diamond State Iron Co. v. Giles*, 7 Houst. 557, 11 Atl. 189; *Crocker v. Pusey etc. Co.*, 3 Penne. 1, 50 Atl. 61; *Lake Shore etc. R. Co. v. Conway*, 169 Ill. 505, 48 N. E. 483; *Whitney etc. Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242; *Ohio & M. R. Co. v. Percy*, 128 Ind. 197, 27 N. E. 479; *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 98 Am. St. Rep. 281, 66 N. E. 882; *Mosgrove v. Zeinbleman Coal Co.*, 110 Iowa, 169, 81 N. W. 227; *Lanza v. Le Grand Quarry Co.*, 124 Iowa, 659, 100 N. W. 488; *Atchison etc. R. Co. v. Swarts*, 58 Kan. 235, 48 Pac. 953; *Buoy v. Clyde Milling etc. Co.*, 68 Kan. 436, 75 Pac. 466; *Ohio Valley R. Co. v. McKinley*, 17 Ky.

Law Rep. 1028, 33 S. W. 186; Bogenschutz v. Smith, 84 Ky. 330, 1 W. 578; Ashland Coal etc. Co. v. Wallace, 101 Ky. 626, 42 S. W. 74 43 S. W. 207; Wilson v. Louisiana & N. W. R. Co., 51 La. Ann. 113 25 South. 961; Frye v. Bath Gas etc. Co., 94 Me. 17, 46 Atl. 80 Knight v. Overman Wheel Co., 174 Mass. 455, 54 N. E. 89 Snizel v. Odanah Iron Co., 116 Mich. 149, 74 N. W. 488; Deluc v. St. Paul City R. Co., 55 Minn. 63, 56 N. W. 461; Dieters v. St. Paul Gaslight Co., 86 Minn. 474, 91 N. W. 15; Mississippi Cotton Co. v. Ellis, 72 Miss. 191, 17 South. 214; Helfenstein v. Medart, 13 Mo. 595, 36 S. W. 863, 37 S. W. 829, 38 S. W. 294; Covey v. Hannibal etc. R. Co., 27 Mo. App. 170; Kelley v. Cable Co., 7 Mont. 7 14 Pac. 633; Union Stockyards Co. v. Goodwin, 57 Neb. 138, 77 N. W. 357; Smith v. Erie R. Co., 67 N. J. L. 636, 52 Atl. 634, 59 L. R. 302; Kranz v. Long Island R. Co., 123 N. Y. 1, 20 Am. St. Rep. 71 25 N. E. 206; Goodrich v. New York etc. R. Co., 116 N. Y. 398, 1 Am. St. Rep. 410, 22 N. E. 397, 5 L. R. A. 750; Wilkie v. Raleigh etc. R. Co., 127 N. C. 203, 37 S. E. 204; Cameron v. Great Northern R. Co., 8 N. Dak. 124, 77 N. W. 1016; Wellston Coal Co. v. Smith, 1 Ohio St. 70, 87 Am. St. Rep. 547, 61 N. E. 143, 55 L. R. A. 99; Geldard v. Marshall, 43 Or. 438, 73 Pac. 330; O'Brien v. Sullivan, 195 Pa. 47 46 Atl. 130; McDonald v. Postal Tel. Co., 22 R. I. 131, 46 Atl. 40 Carter v. Olive Oil Co., 34 S. C. 211, 27 Am. St. Rep. 815, 13 S. E. 41 Freeman v. Illinois Cent. R. Co., 107 Tenn. 340, 64 S. W. 1; Galveston etc. R. Co. v. Adams, 94 Tex. 100, 58 S. W. 831; Daniels v. Union Pac. R. Co., 6 Utah, 357, 23 Pac. 762; Goodman v. Richmond D. R. Co., 81 Va. 576; McDonald v. Swenson, 25 Wash. 441, 65 Pac. 789; Tennessee Coal etc. R. Co. v. Currier, 108 Fed. 19, 47 C. C. A. 16

Likewise, in the absence of proof to the contrary, it is presumed that a master has exercised proper care in the selection of his servants: Conrad v. Gray, 109 Ala. 130, 19 South. 398; Kindel v. Hays, 3 Colo. App. 63, 44 Pac. 781; Hayden v. Smithville Mfg. Co., 29 Conn. 548; Chicago etc. R. Co. v. Geary, 110 Ill. 383; Ohio etc. Ry. Co. v. Dunn, 138 Ind. 18, 36 N. E. 702, 37 N. E. 546; Mayor of Baltimore v. War, 77 Md. 593, 27 Atl. 85; Lee v. Michigan Cent. R. Co., 1 Mich. 574, 49 N. W. 909; Roblin v. Kansas City etc. R. Co., 119 Mo. 476, 24 S. W. 1011; Baulee v. New York etc. R. Co., 59 N. Y. 35 17 Am. Rep. 325; Lilly v. New York etc. R. Co., 107 N. Y. 566, 13 N. E. 503; Mad River etc. R. Co. v. Barber, 5 Ohio St. 541, 67 Am. Dec. 312. A passenger may act on the presumption that the employees of the carrier will use that degree of care which persons of ordinary prudence are accustomed to employ under the same or similar circumstances: Franklin v. Southern California Motor Co., 85 Cal. 63, 24 Pac. 723; Waldron v. Rensselaer etc. R. Co., 1 Barb. 390; Humphrey's Admx. v. Valley R. Co., 100 Va. 749, 4 S. E. 882. And an engineer seeing a boy sitting on a tie may assume he will get out of the way in time to avoid injury: Givens v. Louisville etc. R. Co., 24 Ky. Law Rep. 1796, 72 S. W. 320. B

the presumption of right acting by a traveler killed at a railway crossing is balanced by the presumption that the train operators likewise performed their duties: *Stewart v. North Carolina R. Co.*, 136 N. C. 385, 48 S. E. 793.

"The law presumes that every person performs his duty; and this presumption continues until it is shown affirmatively that he does not or has not. Hence, whenever there is no evidence upon the subject, or where the evidence is equally balanced, this presumption in favor of the person in question requires that the findings of the court and jury should be that such person has performed his duty and is not guilty of any culpable negligence, contributory or otherwise. Hence, while it may be said, in a general sense, that the burden of proving his case devolves upon the plaintiff, yet if he has shown that the defendant was guilty of the negligence causing the injury complained of, and the evidence tending to show that he has performed his duty is at least equal to that which tends to show otherwise, he has made out his case": *St. Louis etc. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408.

In an early case in California, the court said: "While we admit the general rule to be that the burden of proof is on the plaintiff to make a case which will leave him blameless, we do not understand that it follows that he must prove affirmatively, in all cases, that he exercised ordinary care and diligence. In the absence of any direct proof, we are of the opinion that the jury are at liberty to infer ordinary care and diligence on the part of the plaintiff from all the circumstances of the case—his character and habits and the natural instinct of self-preservation. To hold otherwise would be in effect to presume negligence on the part of one in excuse of negligence on the part of another": *Gay v. Winter*, 34 Cal. 153.

Hence in accordance with the principles above set forth, the general rule is said to be that where there is no evidence as to the care exercised by a person who was injured, it will be presumed that, actuated by the love of life, the instinct of self-preservation and the known desire of men to avoid injuries, such person did exercise due care at the time of being injured. The occasion for the application of the rule very rarely arises in cases other than where the person injured was killed as a result of such injuries and there was no other evidence as to the circumstances of the accident: *Atchison etc. R. Co. v. Aderhold*, 58 Kan. 293, 49 Pac. 83; *Hemingway v. Illinois Cent. R. Co.*, 114 Fed. 843, 52 C. C. A. 477; *Baltimore & P. R. Co. v. Landrigan*, 191 U. S. 461, 24 Sup. Ct. Rep. 137, 48 L. ed. 262. Or, as it is sometimes stated, there is never any presumption of contributory negligence because of the fact that self-preservation is the first instinct of humanity: *Norton v. North Carolina R. Co.*, 122 N. C. 910, 29 S. E. 886; *Grant v. Baker*, 12 Or. 329, 7 Pac. 318. In determining whether the plaintiff was guilty of contributory negligence at the time of the happening of the accident, the jury

may take into consideration the natural instinct of self-preservation. *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269. *T* in Pittsburgh etc. Ry. Co. v. Parish, 28 Ind. App. 189, 91 Am. Rep. 120, 62 N. E. 514, which was a suit by an administratrix the negligent killing of her intestate, the court said: "Not o should all the facts and circumstances surrounding him at the t be taken into consideration, but it is proper to consider, also, on question whether he exercised care, that he was sober and indu ous, and a young man in good health, providing for his family, experienced conductor earning from eighty dollars to one hund dollars per month, and that in a person so situated it is to be ferred that the instinct of self-preservation was as strong as in o men. Slight positive testimony, whether circumstantial or otherw when taken in connection with the instincts of self-preservation, the desire to avoid pain or injury to oneself, may be sufficient support a conclusion that one who suffers injury did not help to b it upon himself: See *Allan v. Willard*, 57 Pa. 374; *Chicago etc. R. Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708; *Hopkinson v. Knapp* Iowa, 328, 60 N. W. 653; *Way v. Illinois etc. R. R. Co.*, 40 Iowa, 3 Greenleaf v. Illinois etc. R. R. Co., 29 Iowa, 14, 4 Am. Rep. 181; v. Winter, 34 Cal. 153; *Johnson v. Hudson River R. R. Co.*, 20 N. 65, 75 Am. Dec. 375; *Teipel v. Hilsendegen*, 44 Mich. 461, 7 N. W. Evansville St. R. R. Co. v. Gentry, 147 Ind. 408, 62 Am. St. R. 421, 44 N. E. 311, 37 L. R. A. 378; *Cincinnati etc. R. R. Co. v. Mullen*, 117 Ind. 439, 10 Am. St. Rep. 67, 20 N. E. 287; *Illinois R. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358; *Citizens' St. R. Co. v. Ballard*, 22 Ind. App. 151, 52 N. E. 729."

The presumption of law that the instinct of self-preservation bids the imputation of recklessness to anyone can be considered o in the absence of evidence tending to show negligence on the p of such person: *Newport News Pub. Co. v. Beaumeister*, 102 Va. 6 47 S. E. 821. But the instinct of self-preservation does not open until the mind can see clearly the danger: *Chase v. Maine Cent. R. Co.*, 77 Me. 62, 52 Am. Rep. 744.

And it has been held that where evidence is conflicting as to c current negligence of the party injured, the jury may, in conn tion with all the facts and circumstances of the case, infer the sence of fault from the known disposition of men to avoid injury themselves: *Northern Central Ry. Co. v. State*, 31 Md. 357, 100 A Dec. 69.

**b. Rule as Applicable to Children or Minors.**—There is no p sumption that minors under fourteen years of age are without c cretion and judgment: *George v. Los Angeles R. Co.*, 126 Cal. 3 77 Am. St. Rep. 184, 58 Pac. 819, 46 L. R. A. 829. It must be p sumed until otherwise shown that a minor has exercised the c and circumspection expected of one of his years: *Dubiver v. City M Co.*, 44 Or. 227, 74 Pac. 915, 75 Pac. 693. Indeed, it is even held th

in the absence of evidence to the contrary, it will be presumed that the discretion of a child of eleven years to exercise due care for his own safety is equal to that of an adult: *Over v. Missouri etc. R. Co.* (Tex. Civ. App.), 73 S. W. 535. The presumption that a child fourteen years old has capacity to avoid danger can only be overthrown by clear proof of the absence of such discretion: *Nagle v. Alleghany Valley R. Co.*, 88 Pa. 35, 32 Am. Rep. 413. In an action for negligence causing the death of a thirteen year old boy in defendants' employ, the presumption is that the boy was careful: *Rogers v. Samuel Meyerson Ptg. Co.*, 103 Mo. App. 683, 78 S. W. 79. A boy who is nearly eighteen years of age, employed in a machine shop, is presumed to have sufficient capacity to be sensible of danger and to avoid it: *Sanborn v. Atchison etc. R. Co.*, 35 Kan. 292, 10 Pac. 860. Likewise it will be presumed that a child nearly sixteen years of age knew a heated roller would burn her hand: *Phillips v. Michael*, 11 Ind. App. 672, 39 N. E. 669. And it is also presumed that a boy of sixteen years of age recognizes the patent danger of climbing on moving cars: *Worthington v. Goforth*, 124 Ala. 656, 26 South. 531. And where a child four years old is run over by a team and wagon in a public street, in the absence of anything to indicate that she ran hastily or impulsively under the horses or the wagon, it cannot be presumed that she did so: *Summers v. Bergner Brewing Co.*, 143 Pa. 114, 24 Am. St. Rep. 518, 22 Atl. 707.

### III. Effect of Rule as to Burden of Proving Contributory Negligence upon the Presumption of Due Care.

The question as to whether the defendant is charged with the burden of proving contributory negligence as an affirmative defense, or whether the plaintiff is bound to prove himself to be free from contributory negligence in order to recover, may be said to be a question whether the plaintiff will be presumed to have been in the exercise of due care or presumed not to have been. Of course if it be deemed that *Butterfield v. Forrester*, 11 East, 60, the leading case on the subject of contributory negligence, holds that the want of ordinary care on the part of the plaintiff must be shown before a recovery can be had, then it may be that it is incumbent upon the plaintiff to affirmatively show the exercise of such ordinary care. Lord Ellenborough in that case said: "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action: an obstruction in the road by the fault of the defendant and no want of ordinary care to avoid it on the part of the plaintiff."

The courts are irreconcilably divided upon the question as to whether the burden of proving contributory negligence is upon the defendant or whether the burden is upon the plaintiff to prove his freedom from contributory negligence. The weight of authority is to the effect that it will be presumed that both plaintiff and defend-

ant were in the exercise of ordinary care, and hence that the burden is on the plaintiff to prove negligence on the part of the defendant, and, on the other hand, it is incumbent on the defendant to prove plaintiff's contributory negligence: *Mobile & M. R. Co. v. Crenshaw*, 65 Ala. 569; *Thompson v. Duncan*, 76 Ala. 334; *North Birmingham St. Ry. Co. v. Calderwood*, 89 Ala. 247, 18 Am. St. Rep. 105, 7 So. 360; *Lopez v. Central Arizona Min. Co.*, 1 Ariz. 464, 2 Pac. 748; *Lock Rock etc. R. Co. v. Eubanks*, 48 Ark. 460, 3 Am. St. Rep. 245, 1 W. 808; *MacDougall v. Central R. Co.*, 63 Cal. 431; *Sanders v. Frazier*, 8 Colo. 79, 54 Am. Rep. 544, 5 Pac. 632; *Mares v. Northern Pac. R. Co.*, 3 Dak. 336, 21 N. W. 5; *Boyd v. Blumenthal*, 3 Pa. 564, 52 Atl. 330; *Thompson v. Central etc. R. Co.*, 54 Ga. 509; *St. Louis etc. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. Burns v. Metropolitan St. Ry., 66 Kan. 188, 71 Pac. 244; *Louisiana etc. R. Co. v. Goetz's Admrs.*, 79 Ky. 442, 42 Am. Rep. 227; *Prince George's County v. Burgess*, 61 Md. 29, 48 Am. Rep. 88; *Hocutt v. Weitherick*, 22 Minn. 152; *Buesching v. St. Louis Gaslight Co.*, 1 Mo. 219, 39 Am. Rep. 503; *O'Connor v. Missouri Pac. Ry. Co.*, 1 Mo. 150, 4 Am. St. Rep. 364, 7 S. W. 106; *Lincoln v. Walker*, 1 Neb. 244, 20 N. W. 113; *Smith v. Eastern R. Co.*, 35 N. H. 356; *Jersey Express Co. v. Nichols*, 33 N. J. L. 434, 97 Am. Dec. Cleveland etc. R. Co. v. Crawford, 24 Ohio St. 631, 15 Am. Rep. Dubiver v. City etc. Ry. Co., 44 Or. 227, 74 Pac. 915, 75 Pac. Cassidy v. Angell, 12 R. I. 447, 34 Am. Rep. 690; *Carter v. Columbus G. R. Co.*, 19 S. C. 20, 45 Am. Rep. 754; *Gulf etc. R. Co. v. Shieder*, 1 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; *Hill v. New Haven*, 37 Vt. 50, 1 Am. Dec. 613; *Fowler v. Baltimore etc. R. Co.*, 18 W. Va. 579; *Pride v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558; *Washington etc. R. Co. v. Gladmon*, 15 Wall. 401, 21 L. ed. 114; *Hough v. Texas R. Co.*, 100 U. S. 213, 25 L. ed. 612; *Chicago etc. Ry. Co. v. Price*, 1 Fed. 423, 38 C. C. A. 239; *Watertown v. Greaves*, 112 Fed. 183; *C. C. A. 172*, 56 L. R. A. 865.

But there are numerous authorities holding that the burden is upon the plaintiff to prove that the injury occurred without negligence on his part: *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. 425; *Mount Vernon v. Dusonchett*, 2 Ind. 586, 54 Am. Dec. 467; *Indiana etc. R. Co. v. Greene*, 106 Ind. 279, 6 N. E. 603, 55 Am. 736; *Burns v. Chicago etc. R. Co.*, 69 Iowa, 450, 58 Am. Rep. 227, 30 N. 25; *Moore v. Shreveport*, 3 La. Ann. 645; *Kennard v. Burton*, 25 Me. 43 Am. Dec. 249; *Stock v. Wood*, 136 Mass. 353; *Mitchell v. Chicago etc. R. Co.*, 51 Mich. 236, 47 Am. Rep. 566; *Vicksburg v. Hennrich*, 54 Miss. 391, 28 Am. Rep. 354; *Doggett v. Richmond etc. R. Co.*, 1 N. C. 305.

The rule in New York is that the absence of negligence on the part of the plaintiff contributing to the injury must be affirmatively shown by the plaintiff and that no presumption of freedom from negligence arises from the mere happening of an injury: *Reynolds*



v. New York Central etc. R. Co., 58 N. Y. 248; *Weston v. City of Troy*, 139 N. Y. 281, 34 N. E. 780; *Whalen v. Citizens' Gaslight Co.*, 151 N. Y. 70, 45 N. E. 363; *O'Reilly v. Brooklyn Heights R. Co.*, 82 App. Div. 492, 81 N. Y. Supp. 572.

#### IV. How the Presumption may be Ordinarily Overcome.

"It is certainly true, the motive to self-preservation is a principle of our common nature, and it is but rational to presume, in the absence of evidence to the contrary, that parties act under its promptings in view of impending danger. But, in such cases as the present, there is a counter-presumption, when the proof does not show to the contrary, and that is, that every person charged with a duty involving the safety of himself or others will perform that duty so that in fact it is not often the case that these mere presumptions afford much assistance in arriving at correct or just conclusions. They ought not to be indulged; and it is only where there is as reliable proof to the contrary, or there is a rational doubt upon the evidence as to the acts or conduct of the parties, that such presumptions can properly be invoked. The jury ought not to be instructed in such terms as would justify them in acting upon the mere presumption of the absence of fault in either party, in disregard of the proof in the case, where there are facts and circumstances to be considered by them": *Philadelphia etc. R. Co. v. Stebbing*, 62 Md. 504.

Where there is direct evidence as to the circumstances of the accident, the presumption of due care is not entertained. And the presumption from the instinct of self-preservation does not constitute affirmative proof of any specific act or the exercise of any specific care: *Ames v. Waterloo etc. Transit Co.*, 120 Iowa, 640, 95 N. W. 161. And where a person was killed by a train at a crossing, the presumption that he exercised due care will not prevail as against evidence that he could not have exercised due care: *Crawford v. Chicago G. W. R. Co.*, 109 Iowa, 433, 80 N. W. 519. The presumption that one about to cross a railroad track stopped, looked and listened before and while crossing can only be overcome by testimony showing that he failed to do so: *Hanna v. Philadelphia etc. Ry. Co.*, 213 Pa. 157, 62 Atl. 643, 4 L. R. A., N. S., 344. But the presumption that a person who was killed at a railway crossing exercised due care of himself is balanced by the presumption that the train operators also performed their duties: *Stewart v. North Carolina R. Co.*, 136 N. C. 385, 48 S. E. 793. A presumption of freedom from contributory negligence on the part of a "track-walker" who was killed while walking along the track is overcome by evidence that he was struck by a train which he had reason to expect and which he could see when four hundred feet away: *Baker v. Chicago etc. Ry. Co.*, 95 Iowa, 163, 63 N. W. 667. Likewise the presumption that a person who was struck and killed by a train at a railroad crossing exercised due care to avoid injury is destroyed where it appears from the undisputed

evidence that, if he had looked and listened before driving upon crossing, he must have seen and heard the train approaching: *Bre v. Chicago etc. Ry. Co. (Kan.)*, 86 Pac. 472. Where there is substantial evidence of contributory negligence there can be no presumption that the plaintiff exercised ordinary care: *Lee v. Kn* 55 Mo. App. 390. And where a coal miner is found dead at the mouth of the mine with injuries indicating that he had been crushed, presumption of his exercise of due care arising from the absence of direct evidence of the accident is balanced by the presumption that his master was also free from negligence: *Allen v. Kingston Coal* 212 Pa. 54, 61 Atl. 572.

**V. Existence of the Presumption Where There is No Eye-witness to the Accident or Any Direct Evidence as to Its Circumstances.**

Where there are no eye-witnesses to an accident, a presumption is indulged in some jurisdictions to the effect that a person killed in an accident was in the exercise of due care at the time: *Golinvaux v. Burlington etc. R. Co.*, 125 Iowa, 652, 101 N. W. 465; *Schoepfer v. Hancock Chemical Co.*, 113 Mich. 582, 71 N. W. 1081; *Huntress v. Boston etc. R. Co.*, 66 N. H. 185, 49 Am. St. Rep. 600, 34 Atl. 1; *Baltimore etc. R. Co. v. Landrigan*, 191 U. S. 461, 24 Sup. Ct. R. 137, 48 L. ed.; *Cameron v. Great Northern Ry. Co.*, 8 N. Dak. 177, 77 N. W. 1016. And the presumption of due care arising in a case where there is no eye-witness to an accident causing death is sufficient to enable the plaintiff to recover, upon showing negligence of the defendant: *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 18 Am. St. Rep. 441, 44 N. W. 270. In *Golinvaux v. Burlington etc. R. Co.*, Iowa, 652, 101 N. W. 465, cited above, the court said: "But plaintiff relies to some extent upon what is sometimes called the presumption arising from the instinct of self-preservation, and asks us to say that this was sufficient to take the case to the jury. Had there been no eye-witnesses to the transaction, doubtless this would be true; but the conduct of the men in the wagon from the time they reached the danger zone down to the time the wagon was struck was covered by direct evidence. In such cases it is the rule of this court that this presumption or inference does not exist. The doctrine seems to be bottomed on the thought that, when there is or can be no evidence regarding one's conduct in a place of danger, the instinct of self-preservation implanted in every human heart will raise an inference that he was not guilty of any negligence which contributed to or brought about the injury. But where there is direct evidence as to his conduct, there is no room for this inference, for the reason that his conduct is to be judged from what he in fact did, rather than from an inference as to what he might have done. The entire time during which plaintiff's intestate was in the zone of danger from the passing train, during which he would naturally and reasonably have looked or listened for a train, was fully covered by direct evidence."

dence; hence there was no room for any inferences as to his conduct: *Bell v. Town of Clarion*, 113 Iowa, 126, 84 N. W. 962; *Burk v. Walsh*, 118 Iowa, 397, 92 N. W. 65; *Ames v. Waterloo R. R. Co.*, 120 Iowa, 640, 95 N. W. 161."

Sometimes it is said that slighter evidence of compliance with the duty cast upon plaintiff is deemed sufficient where the injured person is not alive to testify: *Rodrian v. New York etc. R. Co.*, 125 N. Y. 526, 28 N. E. 741. And it has been held in New York, where a person who was in the habit of crossing railroad tracks at an early hour in the morning and knew of a custom of leaving the gates down over night, was killed by an engine going backward at a speed of twenty miles an hour without lights or signals of its approach, that it would be presumed that he looked and listened, where there were no eye-witnesses to the accident: *Pruey v. New York Central etc. R. Co.*, 41 App. Div. 162, 58 N. Y. 797.

Where, however, the person injured is living and testifies to the facts and circumstances, there is no room for inference: *Reynolds v. City of Keokuk*, 72 Iowa, 371, 34 N. W. 167. Or, in other words, where there is direct evidence on the question of the care exercised by the injured person, the presumption of due care becomes of a secondary character and cannot be considered: *Burk v. Walsh*, 118 Iowa, 397, 92 N. W. 65; *Ames v. Waterloo etc. Transit Co.*, 120 Iowa, 640, 95 N. W. 161.

It sometimes is questioned, especially in railroad crossing accidents, what constitutes direct evidence of the accident. The testimony of witnesses who saw the decedent at the moment that he was being struck by an approaching street-car as he emerged from behind a wagon which obstructed his view of the car track was held to be such direct evidence of the accident as rendered the presumption of due care unavailable: *Ames v. Waterloo etc. Transit Co.*, 120 Iowa, 640, 95 N. W. 161. But on this question see the interesting and well-reasoned dissenting opinion by Mr. Justice Weaver in the case just cited. But where the most direct evidence as to the accident was that of a witness who saw the deceased standing on the edge of a sidewalk and a moment later saw him lying in the gutter, but in the interval had heard a clinking sound as if some one had caught his foot in a ring in a staple on the sidewalk, it was held that there was not such direct evidence as would preclude the jury from considering the presumption or inference arising from the instinct of self-preservation: *Schnee v. Dubuque*, 122 Iowa, 459, 98 N. W. 298. In the principal case, evidence of the care and habits of the deceased was introduced over the defendant's objection. The court said: "It seems to be claimed on behalf of appellant that the evidence of the engineer in charge of the train is to the effect that he saw the accident and therefore the evidence introduced in behalf of the plaintiff as to the careful habits of the deceased became incompetent. At the time plaintiff's evidence was offered the engineer had not testified. If it

was insisted that his evidence rendered that of plaintiff incompetent counsel for defendant should have moved to exclude plaintiff's testimony, but this was not done. But the evidence of the engine did not render the testimony incompetent. He did not claim to have seen the accident, but simply testified that he saw a woman approaching the crossing and saw her within a few feet of the east rail of the track, and that, upon sounding the alarm, she stopped, and that he did not know of her being struck, did not stop the train, and did not hear of the fatal accident the next morning. We do not think the trial court was in error in admitting the testimony": *Chicago etc. Co. v. Wilson*, 225 Ill. 50, ante, p. 102, 80 N. E. 56.

And in *St. Louis etc. R. Co. v. Chapman*, 140 Fed. 129, 71 C. C. 523, the question whether there was direct evidence of the accident also arose, the court saying: "If this doctrine of presumption has applicability to a death occurring at such railroad crossing, in view of the positive cautious circumspection the law imposes upon a person approaching such place of recognized danger, its call to the attention of the jury in this instance was misleading. Such presumption can only apply in the absence of any testimony explanatory of the conduct of the person at the time and the manner of his death. The evidence in this case practically traced Chapman from the time he left his hotel for the train until the moment almost of his death. It shows that he left the hotel for the train with his gun and his overcoat, wearing a stiff hat. A man going in that direction was observed by a witness going toward the station, as also by the hack driver. No other person was found to correspond with the movements of this man. And when his body was found under the engine, there were present the two grips, the stiff hat and overcoat to identify him. He was seen by the engineer on 236 just as it passed him in his position was then defined. It was but a few seconds thereafter when he was struck by the engine. It was, therefore, palpably misleading, under such a state of the facts, to tell the jury that there was no eye-witness to the accident, and because there was no one to tell just how it happened, the law presumes that at the time of the accident the deceased was exercising due care, and the burden was upon the defendant to overcome such presumption, and that there was no further presumption that the deceased looked and listened for approaching engines before venturing upon the tracks, and adopting the requisite precaution."

#### VI. Effect Where There is Direct Evidence Indicating Want of Care

It is presumed that all men will, under ordinary circumstances, exercise with due care, but this presumption is not indulged if the circumstances arise such as should convince a reasonable man that such care had not been exercised: *Downey v. Gemini Mining Co.*, 24 U. S. 431, 91 Am. St. Rep. 798, 68 Pac. 414. Where all the facts in the case show plaintiff's negligence, the doctrine that the exercise

care may be presumed from the instinct of self-preservation does not apply: *Gahagan v. Boston etc. R. Co.*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426. Hence where the evidence indicates that if the deceased who had been walking along the track had exercised due care, he would not have been injured, the inference from the instinct of self-preservation is not applicable: *Baker v. Chicago etc. R. Co.*, 95 Iowa, 163, 63 N. W. 667.

## VII. Application of the Presumption of Due Care to Railroad Accidents.

### a. Where Person is Killed While Walking Along a Railroad Track.—

A railroad engineer may presume, until the contrary is indicated, that a pedestrian will take ordinary precautions for his own safety: *Humphrey's Admx. v. Valley R. Co.*, 100 Va. 749, 42 S. E. 982. And likewise that a boy sitting on the track will move away in time to avoid injury: *Givens v. Louisville etc. R. Co.*, 24 Ky. Law Rep. 1796, 72 S. W. 320. The mere fact that a person who was walking on the track is found dead underneath the engine at a grade crossing raises no presumption of negligence on the part of the train operators: *St. Louis etc. R. Co. v. Chapman*, 140 Fed. 129, 71 C. C. A. 523. And where the evidence shows that one killed while walking along the track could have seen it in time to avoid the accident if he had looked, it will be presumed that he did actually so see it; *Lampert v. Lake Shore etc. R. Co.*, 142 Ind. 269, 41 N. E. 586.

### b. Where Accident has Happened at a Railroad Crossing.

1. General Rule Respecting the Presumptions of Care at Such Crossings.—The probative force of the presumption arising from the instincts of self-preservation in railway crossing cases was discussed in *Wabash R. Co. v. De Tar*, 141 Fed. 932. The court said: "Because the natural instinct of self-preservation generally prompts men to acts of care and caution when approaching or in the presence of danger, there is, in the absence of credible evidence of the actual fact in any instance, a presumption of the exercise of due care and caution: *Washington & G. R. Co. v. Gladman*, 15 Wall. 401, 21 L. ed. 114; *Continental Improvement Co. v. Stead*, 95 U. S. 161, 24 L. ed. 408; *Baltimore & Ohio R. R. Co. v. Griffith*, 159 U. S. 603, 16 Sup. Ct. Rep. 105, 40 L. ed. 274; *Texas & Pacific Ry. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. Rep. 1104, 41 L. ed. 186; *Baltimore & Potomac R. R. Co. v. Landrigan*, 191 U. S. 461, 24 Sup. Ct. Rep. 137, 48 L. ed. 262; *The City of Naples*, 69 Fed. 794, 16 C. C. A. 421; *Northern Pacific Ry. Co. v. Spike*, 121 Fed. 44, 57 C. C. A. 384. But it is a presumption of fact, not of law, and, like other presumptions arising from the ordinary or usual conduct of men, rather than from what is invariable or universal, it is disputable, and cannot exist where it is incompatible with the conduct of the person to whom it is sought to apply it: *Fresh v. Gilson*, 16 Pet. 327, 10 L. ed. 982; *Home Ins. Co. v. Weide*, 11 Wall. 438, 20 L. ed. 197; *French v. Edwards*, 13

Wall. 506, 20 L. ed. 702; *Lincoln v. French*, 105 U. S. 614, 26 L. ed. 1189; *Schutz v. Jordan*, 141 U. S. 213, 11 Sup. Ct. Rep. 906, 35 L. ed. 705.

"Thus in *Continental Improvement Co. v. Stead*, 95 U. S. 161, 23 L. ed. 403, it was said of persons approaching and passing over railroad crossings: 'They have, indeed, the greatest incentives to caution for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case. But notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them, such as, namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation for their injuries, even though the railroad company be in fault.'

"And in *Baltimore & Potomac R. R. Co. v. Landrigan*, 191 U. S. 461, 24 Sup. Ct. Rep. 137, 48 L. ed. 262, where approval was given to an instruction to the effect that, in the absence of evidence to the contrary, the subject, there would be a presumption of the exercise of due care by one attempting to pass over a railroad crossing, but that this presumption might be rebutted by evidence of the surrounding circumstances, it was said: 'There are few presumptions based on human feelings or experience that have surer foundation than that expressed in the instruction objected to. But notwithstanding the incentive to the contrary, men are sometimes inattentive, careless, and reckless of danger. These the law does not excuse nor does it distinguish between the degrees of negligence.'

"So, also, in the cases *The City of Naples*, 69 Fed. 794, 16 C. C. A. 421 and *Northern Pacific Ry. Co. v. Spike*, 121 Fed. 44, 57 C. C. A. 384, it was held by this court that the presumption from the natural instinct of self-preservation stands in the place of positive proof 'in the absence of countervailing evidence.' As the presumption reflects only the ordinary or usual conduct of men, and is at utter variance with what they sometimes do, it is not entitled to probative force or weight as affirmative or positive evidence, but only to the force or effect of a rebuttable inference of fact which must necessarily yield to credible evidence of the actual occurrence. Nor is it essential that such evidence shall come from eye-witnesses to the movements of the person injured, because the presumption must equally yield to evidence which shows that the physical surroundings were such that the injury would not have occurred had he been in the exercise of reasonable care: *Tomlinson v. Chicago etc. Ry. Co.*, 134 Fed. 233, 67 C. C. A. 218; *St. Louis & San Francisco R. R. Co. v. Chapman*, 140 Fed. 129, 71 C. C. A. 523; *Rollins v. Chicago & N. W. Ry. Co.*, 139 Fed. 639, 71 C. C. A. 615; *Northern Pacific R. R. Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. Rep. 763, 43 L. ed. 1014."

And in concluding its opinion the court observed: "Both reason and authority enforce and sustain the conclusion that the presumption of the exercise of due care is essentially inferior in probative force and weight to credible evidence, either direct or circumstantial, explanatory of the actual occurrence; that it arises and has application in the absence of such evidence, but not in opposition to it; and that, in those courts where it underlies the rule that the burden of proving contributory negligence rests upon the defendant, and must be maintained by a fair preponderance of the evidence, its force and influence are so largely embodied in the enforcement of that rule that it has little independent application, save as it rests upon a general, but not invariable, rule of human experience which may and should be considered in determining the credibility of evidence and the weight to be given to it when these matters are not otherwise entirely clear."

It may be stated in a general way that in the absence of evidence as to the care exercised by a person killed at a railroad crossing or of circumstances explaining his conduct at the time of the accident or of the manner of its occurrence, it will be presumed that he was in the exercise of due care at the time of the accident: *Crawford v. Chicago etc. Ry. Co.*, 109 Iowa, 433, 80 N. W. 519; *Louisville etc. R. Co. v. Clark's Admr.*, 20 Ky. Law Rep. 1375, 49 S. W. 323; *Schremms v. Pere Marquette etc. R. Co.*, 145 Mich. 190, post, p. 291, 108 N. W. 698; *Priesmeyer v. St. Louis Transit Co.*, 102 Mo. App. 518, 77 S. W. 313; *St. Louis etc. R. Co. v. Chapman*, 140 Fed. 129, 71 C. C. A. 523; *Northern Pacific R. Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. Rep. 763, 43 L. ed. 1014. Hence, where a person in charge of a team and vehicle, which were destroyed in a collision, was killed, it will be presumed that he used such care as an ordinarily prudent man would have used in a like case: *Martin v. Baltimore etc. R. Co.*, 2 Marv. (Del.) 123, 42 Atl. 442. But where a person was killed at a railway crossing and no negligence was shown on the part of the railway company, it will not be presumed that the deceased took the necessary precautions to avoid the accident: *Livermore v. Fitchburg R. Co.*, 163 Mass. 132, 39 N. E. 789. And it will not be presumed that one killed at a railway crossing was in the exercise of due care where the attendant circumstances furnish several hypotheses showing that the plaintiff was guilty of contributory negligence: *Woolf v. Washington etc. Co.*, 37 Wash. 491, 79 Pac. 997. And where the circumstances of the accident by which the traveler was killed at the railway crossing are detailed by an eye-witness, no presumption of due care on his part will be indulged: *Reed v. Queen Anne's R. Co.*, 4 Penne. (Del.) 413, 57 Atl. 529.

As indicated in subdivision V, it is, however, frequently difficult to determine just what constitutes one an eye-witness to the accident. In *Davenport etc. Ry. Co. v. De Yaeger*, 112 Ill. App. 537, the court

in discussing this subject said: "If the instincts tending to self-preservation should not be considered where there is an eye-witness of the accident, that limitation should only apply to cases where the witness has seen and is able to describe the conduct of the deceased at the time of and just prior to the accident. The mere fact that the eye of a witness may have incidentally rested upon the deceased at the time of and just before the injury ought not to deprive plaintiff of the presumption arising from the instincts of self-preservation. In the present case Crosby [a witness] did not know deceased, and while he says he did not see deceased look and listen, yet he evidently did not look at him all the time as deceased approached the crossing, for Crosby testified he himself looked and saw the approaching train (at which time of course he was not looking at deceased), and that he considered with himself whether he had time to go over the crossing before the train would reach it, and, further, that he was close enough to deceased to see whether he did look for the train, listen for it, and could not tell whether deceased looked or listened. While, therefore, he saw deceased, he did not look at him all the time, and he did not observe whether deceased took any precautions to ascertain the approach of the train."

In the principal case, which was an action for death caused by being struck by a train at a crossing, it was held that where no one saw the accident testimony as to the careful habits of the deceased was admissible to show due care on her part: *Chicago etc. R. Co. v. Wilson*, 225 Ill. 50, ante, p. 102, 80 N. E. 56. Likewise, where there is no direct evidence as to the conduct of a person killed at a railway crossing, evidence of his habit and custom to look and listen for trains when approaching the crossing in question was held admissible: *Tucker v. Boston etc. R. Co.*, 73 N. H. 132, 59 Atl. 943. The supreme court of Maine, however, in an early case took a decided stand against the allowance of testimony as to the careful habits of the deceased, who was killed at a railroad crossing. The court in that case, said: "Exception is taken to the judge charging the jury to take into consideration, upon the question of the intestate's care, upon the occasion of the injury, the knowledge of the jury 'of the habits of thought and mind, and the natural instincts of men,' to preserve themselves from injury. Following, as no doubt it did, the impressive argument of counsel that a man would not be so unwisely to rush into danger when it was avoidable—we are inclined to think the idea intended was presented to the jury too prominently.

"Such a consideration is by no means evidence, for if it were a jury might accept it as conclusive evidence. It is no more than accompaniment or an appurtenance of evidence. It may have some influence upon the interpretation of facts affirmatively presented. It pertains, as said by defendant's counsel, to those natural laws in connection with which all evidence may be weighed. It belongs to the class of slight presumptions, described by Mr. Best, which



'taken singly, do not either constitute proof or shift the burden of proof': 1 Best on Evidence, sec. 319. It may give character or force to facts already proved. But it does not of itself add or create proof. It is rather an argument or mode of reasoning upon evidence. Practically speaking, it is no more than that a person's motive may be taken into consideration in relation to any act done by such person. It would be reasonable to say that a man would be naturally stimulated to avoid rather than to rush into dangerous situations. He would be impelled by strong motives to do so. But this would apply to the engineer or fireman or brakeman on a train as well as to the traveler, although perhaps not generally in the same degree.

"But the weakness of the plaintiff's position lies in the fact that this motive for personal safety does not operate upon the minds of men until they can clearly see that they are endangered by their carelessness. It does not keep them from careless acts. The danger is often not seen until too late to be extricated from it. The careless act usually precedes the moment when the natural instincts of self-preservation are aroused. And a man is quite prone to take risks. And a man is careless to take a risk in crossing a railroad in advance of a coming train. We all know that he often does it": Chase v. Maine Central R. Co., 77 Me. 62, 52 Am. Rep. 744.

2. **Presumptions Respecting the Duty to Look and Listen.**—The decisions upon the question whether it will be presumed that one about to cross a railroad track at a public crossing stopped, looked and listened before attempting to do so are naturally conflicting by reason of the rule had in different jurisdictions respecting the question whether the plaintiff must prove his freedom from contributory negligence or whether the burden is upon the defendant to affirmatively establish the existence of contributory negligence on the part of the plaintiff. The weight of authority, however, is to the effect that, in the absence of evidence tending to show that the traveler did not stop, look and listen before attempting to cross the tracks at a public crossing, it will be presumed that he did so: Reed v. Queen Anne's R. Co., 4 Penne. (Del.) 413, 57 Atl. 529; Cowen v. Merriman, 17 App. D. C. 186; Illinois etc. R. Co. v. Nowick, 148 Ill. 29, 35 N. E. 358; Dalton v. Chicago etc. R. Co., 104 Iowa, 26, 73 N. W. 349; Kansas City etc. R. Co. v. Gallagher, 68 Kan. 424, 75 Pac. 469, 64 L. R. A. 344; Atchison etc. R. Co. v. Baumgartner (Kan.), 85 Pac. 822; Wyoming v. Detroit etc. R. Co., 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 141; Crumpley v. Hannibal etc. R. Co., 111 Mo. 152, 19 S. W. 820; Weller v. Chicago etc. R. Co., 164 Mo. 180, 86 Am. St. Rep. 592, 64 S. W. 141; Lyman v. Boston etc. R. Co., 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364; Hunters v. Boston etc. R. Co., 66 N. H. 185, 49 Am. St. Rep. 600, 34 Atl. 154; McBride v. Northern etc. R. Co., 19 Or. 64, 23 Pac. 814; Weiss v. Pennsylvania R. Co., 79 Pa. 387; Sullivan v. New York etc. R. Co., 175 Pa. 361, 34 Atl. 798; Kimball v. Friend's Admr., 95 Va. 125, 27 S. E. 901; Southern R. Co. v. Bryant's Admr.,

95 Va. 212, 28 S. E. 183; *Washington & G. R. Co. v. Gladmon*, Wall. 401, 21 L. ed. 114; *Texas etc. R. Co. v. Gentry*, 163 U. S. 318 Sup. Ct. Rep. 1104, 41 L. ed. 186; *Baltimore etc. R. Co. v. Sandrigan*, 191 U. S. 461, 24 Sup. Ct. Rep. 137, 48 L. ed. 262.

But in other jurisdictions it is held that no presumption will be indulged that the traveler did stop, look and listen before attempting to cross the tracks: *Indiana etc. R. Co. v. Greene*, 1 Ind. 279, 55 Am. Rep. 736, 6 N. E. 603; *Miller v. Louisville etc. R. Co.* 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339; *Evansville St. R. Co. v. Gentry*, 147 Ind. 408, 62 Am. St. Rep. 421, 44 N. E. 311, 1 L. R. A. 378; *Cleaves v. Pigeon G. Co.*, 145 Mass. 541, 14 N. E. 646; *Livermore v. Fitchburg R. Co.*, 163 Mass. 132, 39 N. E. 78; *Walsh v. Boston etc. R. Co.*, 171 Mass. 52, 50 N. E. 453; *Rainey v. New York etc. R. Co.*, 68 Hun, 495, 23 N. Y. Supp. 80; *Bates v. New York etc. R. Co.*, 84 Hun, 287, 32 N. Y. Supp. 337; *Von Atying v. New York etc. R. Co.*, 83 Hun, 120, 31 N. Y. Supp. 632.

**3. Rule Where had the Deceased Looked and Listened He Would have Seen and Heard the Approaching Train.**—The general rule is that a person attempting to cross a railroad track when an approaching train is in full view is chargeable with seeing what he could have seen if he had looked, and with hearing what he could have heard if he had listened. In other words, where he apparently looks but does not see the approaching train, it will be presumed that he did not look at all or if he did that he did not heed what he saw: *Glascow v. Central etc. R. Co.*, 73 Cal. 137, 14 Pac. 518; *Chicago etc. R. Co. v. De Freitas*, 109 Ill. App. 104; *Toledo etc. R. Co. v. Gallagher*, 109 Ill. App. 67; *Southern R. Co. v. Davis*, 34 Ind. App. 377, 72 N. E. 1053; *Indiana etc. R. Co. v. Hammock*, 113 Ind. 1, 14 N. E. 737; *Cleveland etc. R. Co. v. Miller*, 149 Ind. 490, 49 N. E. 445; *Southern Ry. Co. v. Davis*, 34 Ind. App. 377, 72 N. E. 1053; *Northern Cent. R. Co. v. McMahon*, 97 Md. 483, 55 Atl. 627; *Tucker v. Chicago etc. Ry. Co.* 122 Mich. 149, 80 N. W. 984; *Miller v. Truesdale*, 56 Minn. 274, 61 N. W. 661; *Schmidt v. Great Northern R. Co.*, 83 Minn. 105, 85 N. W. 935; *Lane v. Missouri etc. R. Co.*, 132 Mo. 4, 33 S. W. 645, 112 Mo. 33; *Hook v. Missouri etc. R. Co.*, 162 Mo. 569, 63 S. W. 360; *Burke v. New York etc. R. Co.*, 73 Hun, 32, 25 N. Y. Supp. 1009; *Dolfini v. Erie R. Co.*, 178 N. Y. 1, 70 N. E. 68; *McAuliffe v. New York etc. R. Co.* 88 App. Div. 356, 84 N. Y. Supp. 607, affirmed in 181 N. Y. 53, 73 N. E. 1126; *Swart v. New York etc. R. Co.*, 81 App. Div. 402, 73 N. Y. Supp. 906, affirmed in 177 N. Y. 529, 69 N. E. 1131; *Myers v. Baltimore & O. R. R. Co.*, 150 Pa. 386, 24 Atl. 747; *Newhard v. Pennsylvania R. Co.*, 153 Pa. 417, 19 L. R. A. 563, 26 Atl. 105; *Dryden v. Pennsylvania R. Co.*, 211 Pa. 620, 61 Atl. 249; *Woolf v. Washington etc. Co.*, 37 Wash. 491, 79 Pac. 997; *Haetsch v. Chicago etc. R. Co.* 87 Wis. 304, 58 N. W. 393; *Rollins v. Chicago etc. Ry. Co.*, 139 Fed. 639, 71 C. C. A. 615.

In California it is held, where the view of the track is obstructed, a person attempting to cross the track must take such precautions as the circumstances demand, and if, taking those precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions: *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 Pac. 651; *Bilton v. Southern Pacific Co.*, 148 Cal. 443, 83 Pac. 440.

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### GREENBERG v. PEOPLE.

[225 Ill. 174, 80 N. E. 100.]

**CONSTABLES—Bonds—Liability of Sureties.**—If a constable is acting under color or by virtue of his office at the time he commits an assault or other wrongful act, his bondsmen are liable; but if, on the contrary, at the time of the commission of such wrongful act, there was no connection between it and his official capacity or line of duty, his bondsmen are not liable. (p. 129.)

**CONSTABLES—Assault—Liability of Sureties.**—If a constable makes an assault upon the wife of an execution debtor to prevent her from assisting her husband in preparing a schedule of property levied upon, and out of which he is entitled to claim an exemption, the sureties upon such constable's bond are liable in damages. (p. 131.)

E. H. Morris and C. S. Beattie, for the appellants.

Wheeler, Silber & Isaacs, for the appellee.

<sup>174</sup> **HAND, J.** This was an action of debt, commenced in the name of the people, for the use of Augusta Balaban, against Louis Greenberg as principal and M. Bromberg and James Foster as sureties, in the circuit court of Cook county, upon the official bond, as constable, of Louis Greenberg.

The declaration was in the usual form in debt upon an official bond, and assigned, as a breach of said bond, that while said Greenberg, as constable, was engaged in levying an execution upon a stock of merchandise belonging to the <sup>175</sup> husband of said Augusta Balaban, the said Augusta Balaban was assisting her husband in making a schedule of such merchandise for the purpose of enabling her husband to claim his exemption as the head of a family, and for the purpose of preventing such schedule being made the said Greenberg made an assault upon said Augusta Balaban, whereby she was injured, etc. The defendants filed a plea of non est factum and a special plea denying that said Greenberg, as

constable, committed any of the acts set forth in the declaration. Issues were joined upon said pleas, and a trial before a jury resulted in a verdict in favor of the plaintiff for the sum of ten thousand dollars in debt, that being the amount of the penalty of the bond, and eight hundred dollars damages, upon which verdict, after overruling a motion for a new trial and in arrest of judgment, the court rendered judgment in favor of plaintiff, which judgment, on appeal, was affirmed by the appellate court, and a certificate of importance having been granted, a further appeal has been prosecuted to this court.

The defendants introduced no evidence, and the evidence introduced on behalf of the plaintiff fairly tended to show that Israel A. Balaban had a small retail grocery store in the city of Chicago, which was carried on by him with the assistance of his wife, Augusta Balaban; that one Cohen recovered a judgment against Balaban for three dollars and ninety cents and costs, and an execution issued thereon, which was placed in the hands of Greenberg, as a constable, to serve; that Greenberg went to the store of Balaban, in company with three assistants, to make a levy under said execution; that the amount claimed by Greenberg of Balaban was ten dollars and seventy cents; that Balaban could not pay the same and asked time to make a schedule of his personal property, and stated to Greenberg that he did not have to exceed in value four hundred dollars' worth of personal property, all of which he claimed as exempt from execution under the exemption laws of this state; that Greenberg refused to recognize the right of Israel A. Balaban to an exemption to allow him time to make a schedule, but he and his assistants <sup>176</sup> immediately proceeded to remove the goods from the shelves of the store and to place them in boxes and barrels; that a brother in law of Balaban, who was a deputy clerk of the circuit court of Cook county and who had been sent for by Balaban, arrived while the goods were being removed, and with his assistance, and that of his wife, Balaban attempted to make a schedule of his personal property, and that while thus engaged, Augusta Balaban, under the direction of the brother in law and in the presence of her husband, went to a box in which Greenberg had placed a portion of the goods taken by him from the shelves of the store, for the purpose of calling off their number and amount, to the end that the

might be placed upon the schedule which was then being prepared; that she leaned over the box for the purpose of ascertaining what was in it, whereupon Greenberg pushed her away; that she again stooped down to examine the contents of the box, when Greenberg picked up the box for the purpose of preventing her from examining its contents, and struck said Augusta Balaban in the abdomen with the box so violently that she was thrown backward upon several boxes or barrels standing in the store; that Augusta Balaban was then far gone in pregnancy, which was apparent to the bystanders, and to which fact the attention of Greenberg had been particularly called by the brother in law, with the request that he refrain from injuring her; that three days after being thus injured by Greenberg, Augusta Balaban gave birth to a dead child, and she was confined to her bed and under the care of a physician for a number of weeks as the result of such injury. After the assault upon Augusta Balaban she was put to bed, and a number of women who were in the store raised the amount of money demanded by Greenberg and paid the same to him, and he receipted the payment of the amount upon the copy of the execution delivered to Balaban and released the levy and left the store.

It is apparent from the foregoing statement that the conduct of Greenberg on the occasion of the making of said <sup>177</sup>levy was oppressive, and the assault by him, under the circumstances disclosed by the evidence, upon Augusta Balaban was wholly unjustified and without excuse, and he should respond in damages to her for the injury sustained by her by reason of his misconduct. The question here, however, presented for decision is, Can the sureties upon his bond as constable be held liable in this action for the consequences flowing from such misconduct of their principal? The correct answer to such question depends upon whether or not, at the time Greenberg assaulted Augusta Balaban, he was acting in his official capacity as constable—that is, was he acting under color or by virtue of his said office at the time the assault was made? If he was so acting, his bondsmen are liable; on the contrary, if at the time of the assault there was no connection between the levy of said execution and the assault, it was the personal and not the official act of Greenberg which caused the injury to Augusta Balaban, and his bondsmen are not liable.

In *Turner v. Siisson*, 137 Mass. 191, which was a suit upon a constable's bond for seizing the property of one person upon an execution against another, the court held the object of the bond was to make the sureties responsible for the due performance of the constable's official acts, and it was said: "By an official act is not meant a lawful act of the officer in the service of process; if so, the sureties would never be responsible. It means any act done by the officer in his official capacity, under color and by virtue of his office." The foregoing language of the Massachusetts court was cited with approval by this court in *Campbell v. People*, 154 Ill. 595, 39 N. E. 578, which was a suit upon a county clerk's bond.

In *Clancy v. Kenworthy*, 74 Iowa, 740, 7 Am. St. Rep. 508, 35 N. W. 427, which was an action upon a constable's bond for making a false arrest, it was contended, as it appeared the constable had no lawful authority to make the arrest, the act was not done in the line of his official duty, and his bondsmen could not, by reason of that fact, be held liable. The court, on page 743, <sup>178</sup> said: "In truth, his act was in the line—direction—of official duty, but was illegal because it was in excess of his duty. In the discharge of official functions he violated his duty and oppressed the plaintiff. This is all there is of it. If in exercising the functions of his office defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in discharge of his duty he, of course, is not liable. It follows that, if defendant's position be sound, no action can be maintained upon the bond in any case."

In *State v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 257, 31 N. E. 950, a constable who had a writ of replevin to execute, forced an entrance into a dwelling-house where a sewing-machine described in the writ was kept by an inmate and assaulted the owner of the dwelling. While resisting the entry of the officer into the house the householder was injured by the officer, and it was held the constable's bondsmen were liable for the misconduct of the constable in unlawfully entering the dwelling-house and assaulting the owner thereof.

In the case at bar Greenberg had gone to the store of Israel A. Balaban to levy the execution, and while he was proceeding to execute the writ by making a levy the execution debtor sought to schedule his personal property for the purpose of claiming his exemption as the head of a family. This he had a right to do, and it was unlawful for the officer to prevent him from so doing, and he might lawfully call to his aid his wife and brother in law to assist him in making such schedule. While his wife was attempting to examine the goods which Greenberg had taken from the shelves in the store and placed in a box, for the purpose of calling off their number and amount that the same might be written into the schedule, Greenberg assaulted her, as the evidence fairly tends to show, with a view to prevent a schedule from being made and thereby to deprive the execution debtor<sup>179</sup> of his exemption. Had Greenberg assaulted the execution debtor while he was attempting to examine the property levied upon and before it had been removed from his possession, with a view to make a schedule upon which to base a claim of his exemption, such act would clearly have been an official act and rendered the bondsmen of Greenberg liable to Israel A. Balaban, and we do not see that his wife, Augusta Balaban, stands in a different position to Greenberg and his bondsmen from that of the execution debtor, at whose request she was engaged in examining and calling off the number and amount of goods sought to be taken under the execution by the constable. It would therefore appear too plain for argument that at the time of the assault Greenberg was acting in his official capacity—that is, under color and by virtue of his office—and that Mrs. Balaban was so far connected with the execution of said writ as to make the bondsmen of Greenberg liable for the consequences of the assault made by Greenberg upon her. In other words, Greenberg made the assault upon Augusta Balaban while acting in his official rather than in his private capacity, which brings his unlawful act clearly within the principles announced in the cases heretofore cited.

The authorities upon the question of the liability of bondsmen for the official misconduct of public officers are not in entire harmony. The appellants largely rely, to show want of liability on the part of the bondsmen, upon *State v. Day-*

ton, 101 Md. 598, 61 Atl. 624, where the supreme court Maryland held, in a case somewhat similar to the case at bar, that the bondsmen of a constable were not liable for an assault made upon a person who was present while the constable was making a levy upon merchandise in the store where the person assaulted was employed; also Jewell v. Mills, 3 Bush, 62, and South v. State of Maryland, 18 Ho. 396, 15 L. ed. 433. The statute in this state provides (Hurd's Stats. 1905, c. 79, sec. 9, p. 1272) that the bonds of justice of the peace and constables in this state shall be made payable to the people <sup>180</sup> of the state of Illinois, and "shall be held for the security and benefit of all suitors and other persons who may be injured or aggrieved by the official acts or misconduct of such justice of the peace or constable, as the case may be." In Campbell v. People, 154 Ill. 595, 39 N. E. 578, the court said: "The object of requiring official bonds is to obtain indemnity against the use of an official position for wrongful acts done under color of office." To hold that the bondsmen of Greenberg were not liable, under the facts disclosed in this case, would be to lay down a rule we think inconsistent with the spirit of the statute above quoted and in conflict with what we believe to be the better rule, and the one supported by the greater weight of authority and approved by this court in Campbell v. People, 154 Ill. 595, 39 N. E. 578. While we think, by reason of the peculiar language found in our statute, this case may be distinguished from the case of State v. Dayton, 101 Md. 598, 61 Atl. 624, still, if we were of the opinion that case was directly in point in view of the apparent conflict in the authorities and what was said by this court in the Campbell case, 154 Ill. 595, 39 N. E. 578, we would not be disposed to follow the line of cases in conflict with the case of Turner v. Sisson, 137 Mass. 191, which we think announces the true rule.

The appellants have raised a number of questions on the record in addition to the one already disposed of, among which is that of a claimed variance between the proofs and the declaration, and the want of proper proof to establish the genuineness of certain documentary evidence admitted in evidence upon the trial. The questions thus raised are extremely technical, and we think without merit, and what the questions discussed in the briefs have all been considered



by the court, we do not deem it necessary to take them up severally in this opinion.

Finding no reversible error in this record the judgment of the appellate court will be affirmed.

Mr. Justice Carter took no part in the decision of this case.

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*The Liability of Sureties on an Official Bond* for the trespasses of their principal is discussed in the notes to *State v. Timmons*, 78 Am. St. Rep. 420. The liability of sureties on the bonds of sheriffs and constables is further considered in the note to *Feller v. Gates*, 91 Am. St. Rep. 531. And the liability of the officer himself to private individuals for the misperformance of his duties is discussed in the note to *Worden v. Witt*, 95 Am. St. Rep. 72.

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## NELSON v. CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

[225 Ill. 197, 80 N. E. 109.]

**PROCESS—Constructive Service on Residents.**—A statute is valid which authorizes the service of process by publication and mail in an action on the case against a railroad company whose principal office is in the state, but outside the county where the injury occurred, and when the suit is brought and the sheriff makes return upon the summons that the defendant company has no officer or agent in such county upon whom process could be served. (p. 136.)

**CONSTITUTIONAL LAW—Process—Constructive Service on Residents.**—A statute providing for a constructive service of process by publication and mail in lieu of actual service, in a case where process cannot be actually served upon the defendant in the county where the statute expressly authorizes the suit to be begun, even though the defendant resides and is in the state, is constitutional and valid, and such service constitutes due process of law. (pp. 139, 140.)

**PROCESS—Constructive Service on Residents.—Personal Judgment** in an action at law may be rendered against a defendant residing in and who is in the state where the suit is pending, who has been notified of its pendency by constructive service of process, where it appears that actual service of process could not be had, and the constructive service provided for was required to be made in such manner that the reasonable probabilities were that the defendant would receive notice of the pending action before judgment. (p. 143.)

Murphy, Alschuler & Clyne, for the appellant.

Hopkins, Poffers & Hopkins, for the appellee.

<sup>100</sup> **HAND, J.** The appellant, Lars R. Nelson, on the twenty-first day of April, 1906, filed a praecipe in the office of the clerk of the circuit court of Kane county for a sum-

mons in an action on the case against the Chicago, Burlington and Quincy Railway Company, an Iowa corporation, and the Chicago, Burlington and Quincy Railroad Company, an Illinois corporation. A summons was issued against both companies and delivered to the sheriff of said county to serve, which summons was returned by said sheriff not served as to the railroad company, because the president or any other of the officers or agents of said railroad company with whom the statute provides a copy of the summons may be left to effect service of process upon the company, could not be found by him in said county. The praecipe and summons were then amended and the case discontinued as to the railway company and the railroad company was served with process by publication and mail, as in chancery cases, as is authorized by paragraph 5 <sup>200</sup> of the practice act (Hurd's Stats. 1905, c. 110), and a declaration was filed against the railroad company.

It appears from the affidavit for publication and the declaration that said railroad company, at the time of the alleged injury, was the owner of a line of railway extending into and through Kane county, which line the said railroad company had leased to said railway company, and that the appellant was injured in the city of Aurora, in Kane county, by the negligence of the said railway company while operating the said railway line, and that the principal place of business of the railroad company was in Chicago, Cook county, Illinois. The railroad company entered a special appearance and moved to quash the service of process had upon it by publication and mail, which motion was sustained, and the appellant electing to stand by the service of process and refusing to proceed further, the court dismissed the suit, and the appellant has prosecuted this appeal.

It is first contended by the railroad company that paragraph 5 of the practice act does not authorize service of process by publication and mail upon a defendant railroad company that has its principal office in this state, in a cause where the object of the suit is to obtain a judgment in personam against the railroad company; and secondly, if service of process by publication and mail is authorized by said paragraph 5 upon a defendant railroad company that has its principal office in this state in a suit where a judgment in personam is sought against the railroad company, the statute

is unconstitutional and void, as such service of process, it is said, does not constitute due process of law.

Paragraph 2 of the practice act provides actions against a railroad company may be brought in the county where its principal office is located, or in the county where the cause of action accrued, or in any county into or through which its road may run; and paragraph 5 of the same act provides an incorporated company may be served with process by leaving a copy of the process with its president, if he can <sup>201</sup> be found in the county in which the suit is brought, and if he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent or any agent of said company found in the county, and in case the proper officer shall make return upon such process that he cannot in his county find the president or any other officer or agent named in said statute with whom it is provided, a copy of the summons may be left to effect service of process upon such incorporated company, "then such company may be notified by publication and mail in like manner and with like effect, as is provided in sections twelve (12) and thirteen (13) of an act entitled 'An act to regulate the practice in courts of chancery,' approved March 15, 1872"; and section 12 of the chancery act provides for the filing of an affidavit, the publication of a notice of the pendency of the suit in a newspaper, and the mailing of a copy of the notice published, within ten days from the date of its first publication, to the defendant at his address stated in the affidavit for publication; and section 13, that the notice provided for in section 12 shall be published at least once in each week for four successive weeks, and that no default or proceeding shall be taken against a defendant not served with summons and not appearing unless forty days shall intervene between the first publication of said notice and the first day of the term at which such default or proceeding is proposed to be taken.

We are unable to discover from a reading of these sections of the statute why they are not broad enough in their terms to include a case like this, or any other action at law which may be brought against an incorporated railroad company, where no officer or agent of the company is found in the county where the suit is brought with whom a copy of

the summons can be left to effect service upon the railroad company, and where it appears the principal office of the railroad company is located within the state of Illinois. <sup>202</sup> Sections 12 and 13 of the chancery act clearly cover chancery suits where service of process by publication and mail is permissible which may be brought against an incorporated railroad company, and we think they authorize the service of process by publication and mail in an action upon the case against an incorporated railroad company whose principal office is located in this state, outside the county in which the suit is brought, where the sheriff makes a return upon the summons that said railroad company has no office or agent in the county where the suit is brought to whom a copy of the process can be delivered for the purpose of effecting service of process upon the railroad company. In *Chicago etc. R. R. Co. v. Weber*, 219 Ill. 372, 76 N. E. 489, 4 L. R. A. N. S., 272, which was an action on the case, on page 390, it is said: "By section 1 of the practice act railroad companies may be sued where the principal office is located or in any county through which the railroad runs, and by section 4 of the act, as we have already pointed out, service may be had in those counties where no agent or clerk or other person authorized by the statute to be served in such cases is kept, but publication in the same manner as in suits in chancery."

It is urged, however, that service of process by publication and mail can only be had, in chancery cases, where the affidavit for publication shows that the defendant resides or has gone out of this state, or on due inquiry cannot be found, or is concealed within this state so that process cannot be served upon him; and it is said, as the affidavit for publication in this case shows the appellee is a resident of Cook county, in this state, service of process cannot be had upon it by publication and mail—in other words, that the method pointed out in sections 12 and 13 of the chancery act by which a defendant in chancery may be served with process by publication and mail applies only to nonresident defendants, and such defendants as have gone out of the state, or on due inquiry cannot be found, or who have concealed themselves so that process cannot be served upon <sup>203</sup> them. If sections 12 and 13 of the chancery act were considered alone, the contention of the appellee would be sound. In determining the question now under consideration

however, we are forced to consider paragraphs 2 and 5 of the practice act in connection with sections 12 and 13 of the chancery act. The first of those paragraphs provides that an incorporated railroad company may be sued in any county where its principal office is located, or in any county where the cause of action accrued, or in any county into or through which its road may run. The appellant was injured in Kane county and the road of the appellee runs into and through Kane county. The appellant was therefore authorized to bring his suit in Kane county. It is also provided by said paragraph 5, if the officer makes a return that he cannot find the president or any officer or agent of the railroad company in the county where the suit is brought with whom he is authorized to leave a copy of the summons to effect service, then service of process may be had upon the company by publication and mail in like manner and with like effect as is provided in the chancery act. The officer in this case did make a return that he could not find the president or any officer or agent of the appellee in Kane county with whom he was authorized to leave a copy of the summons, and that in consequence of such failure he returned the summons not served. The appellant has therefore brought himself clearly within the language of that paragraph of the practice act, and those provisions of the chancery act which provide that the affidavit for publication shall show that the defendant does not reside in or has gone out of the state, or upon due inquiry cannot be found, or conceals himself so that process cannot be served upon him, do not apply to a case like this. The only condition precedent to the right to obtain service of process by publication and mail in case the railroad company has no officer or agent in the county where the suit was brought with whom a copy of the summons can be left to effect service of process is, that the officer shall make a return <sup>204</sup> showing his inability to find an officer or agent of the company in the county where the suit is brought with whom he is authorized to leave a copy of the summons to effect service of process upon the company.

It is also said that in chancery cases a personal judgment cannot be based upon service of process by publication and mail (*Town of Virden v. Needles*, 98 Ill. 366), and as the statute provides a railroad company that has no officer or agent in the county in which the suit is brought with whom

a copy of the summons may be left may be served with process by publication and mail with like effect as is provided in sections 12 and 13 of the chancery act, and as there can be no personal judgment based upon a summons by publication and mail in a chancery suit, and the service of process in this case was made with a view to obtain a personal judgment against the appellee, the service of process by publication and mail was properly quashed. Paragraph 5 of the practice act contains no exceptions, but applies with equal force to a case against an incorporated railroad company whether the object of the suit is to obtain a judgment in personam or the proceeding is in rem, and if the service of process by publication and mail in a case like the one at bar where the object of the suit is to obtain a personal judgment is valid, then the service of process here is good. To go to the words "with like effect," found in section 5 of the practice act, the construction contended for by the appellee would be to hold that while the sections of the statute above referred to, when considered together, authorize a defendant railroad company situated like the appellee company to be served with process by publication and mail, yet after it is thus served the court is powerless to render a judgment against such railroad company, which construction would nullify those sections of the statute when applied to a case like this. We are clearly of the opinion the statute is broad enough to cover a case like the one at bar if the legislature has power to authorize service in such case in <sup>205</sup> that manner. If, however, under no circumstances a personal judgment in an action at law like this can be based upon a service of process by publication and mail, then the service of process here was bad and was properly quashed—which brings us to a consideration of the appellee's second proposition.

The law provides for two methods of service of process—the one actual and the other constructive. Actual service of process is made by reading the original process to the defendant or by delivering to him a copy thereof; and constructive service of process, which is a substituted service of process, is made by leaving a copy of the process at the defendant's residence when he is absent, or by posting and publishing notice of the pendency of the suit and mailing

copy of the notice posted or published to the defendant, if his postoffice address is known. It is held that the service of process, either actual or constructive, upon a nonresident defendant outside the limits of the state where the action or proceeding is pending will not authorize the rendition of a personal judgment or decree against a defendant, but that such service of process is sufficient upon which to base a decree changing the marital status in a proceeding for divorce, or a judgment or decree disposing of property situated within the jurisdiction of the court wherein the action or proceeding is pending. It is also held that each state may determine for itself in what method process may be served upon its citizens within its own boundaries, and while such legislation will have no force outside the state, service of process within the state in the manner pointed out in the statute regulating the method of obtaining such constructive service of process, if the method of service of process provided for is such as to amount to due process of law, as these terms are used in the state and federal constitutions, will be sufficient to authorize the courts of the state within whose jurisdiction the service of process is had to pronounce a personal judgment or decree against a defendant so served with <sup>due</sup> process, although cases may arise in practice upon such constructive service of process where a personal judgment or decree might be obtained against a defendant without such defendant having received actual notice of the pendency of the action prior to judgment or decree. Constructive service of process, it is said, is authorized in a certain class of cases, such as when the defendant has gone out of the state, or when he cannot be found, or when he conceals himself so that process cannot be served upon him, as the result of necessity—that is, such constructive service of process is substituted for actual service of process when actual service of process cannot be had upon a defendant. In this case actual service could not be had upon the defendant although the suit was properly brought in the court from which the process was issued and the defendant was a resident of and was in the state, and the question here is narrowed to this: Can the legislature provide a constructive or substituted service of process by publication and mail, in lieu of actual service of process, in a case where the process cannot be actually served upon the

defendant in the county where the statute expressly authorizes the suit to be commenced, although the defendant resides and is in the state?

The case of *Bimeler v. Dawson*, 4 Scam. 536, 39 Am. L. 430, was an action of debt upon a judgment rendered by a court of common pleas of Stark county, in the state of Ohio, against Welch & Dawson. There was service of process upon Dawson only, and he pleaded nul tiel record and that he was not personally served with process. The record showed personal service upon Welch and service on Dawson by leaving a copy of the summons at his residence, and the rendition of a judgment by default against both defendants. The trial court held that for want of personal service upon Dawson the judgment was not evidence of indebtedness against him, and rendered judgment in his favor. Upon an appeal to the court the judgment was reversed, and in an opinion prepared by Justice Treat, on page 542, it was said: "The laws of the several states provide different modes of bringing parties into court. In some states personal service of process is required, while in other states that mode is indispensable, but a party may be required to appear and defend an action on notice by publication or by the leaving of process at his residence. It is doubtless competent for each state to adopt its own regulations in this respect, which will be binding and obligatory on its own citizens. We cannot doubt the right or power of the state of Ohio to provide that the kind of service which it appears was made in this case shall be sufficient to authorize its courts to take jurisdiction of the person of a defendant and proceed to hear the case and render judgment. A judgment thus rendered against one of its citizens would be binding and conclusive on him, for, owing allegiance to the state, he is bound by its law and amenable to its judicial tribunals. That state, however, cannot in that way get jurisdiction over the persons of other states. Its law can only operate within its own territory and on its own citizens. They cannot be made to operate extraterritorially, or on the citizens of other states unless they go voluntarily within its limits."

And in *Welch v. Sykes*, 3 Gilm. 197, 44 Am. Dec. 689, it was said: "It is competent for each state to prescribe its mode for bringing parties before its courts. Although



regulations in this respect can have no extraterritorial operation, they are nevertheless binding on its own citizens."

And in *Smith v. Smith*, 17 Ill. 482, on page 484, it was said: "A state may undoubtedly provide for bringing its own citizens or subjects before its tribunals by constructive notice, which may not in all cases come to the actual knowledge of the party; still the presumption is that he has actual notice, or might have such notice by the exercise of proper care and diligence."

The case of *Bickerdike v. Allen*, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782, was a creditor's bill based upon a judgment which had been revived by scire facias upon the service of process by publication and <sup>208</sup> mail, and the contention was made that the judgment was not properly revived upon such service, as it was said the service of process did not constitute due process of law. The court below entered a decree overruling the contention of the defendant, and upon appeal to this court the distinction between the effect of service of process by publication and mail, heretofore referred to, upon a resident and a nonresident defendant was pointed out by the court, and it was held that if section 26 of the practice act was so construed as to apply to a nonresident judgment creditor, it would, as to such creditor, be unconstitutional. The act, however, was sustained as to resident judgment creditors, and it was held that while a statute which authorized the revival of a judgment by scire facias upon service of process by publication alone would be invalid, as not constituting due process of law, the paragraph of the statute under consideration, which provided for service of process by both publication and mail as to a resident judgment creditor, was due process of law and valid. The court, on page 102, said: "This statute does something more than require the publication of the notice; it requires a copy of the notice to be sent by mail, addressed to the defendant whose place of residence is stated in the affidavit. . . . Hence we are inclined to think that section 26, taken in connection with section 12 of the chancery act, is a constitutional enactment so far as it provides for service by publication of notice and mailing of copy thereof to residents of the state whose residence is stated in the affidavit."

What is due process of law in all instances is not exactly defined, but as applied to this case it clearly means proceeding according to the course of the common law, and the common law has from time immemorial required that a defendant be personally notified of the pendency of an action if he was within the jurisdiction of the court and could be found, before judgment or decree was rendered against him. The common law, however, never required actual service of process in all cases, but has always provided for a constructive service of process when actual service thereof could not be had, such as the leaving of a copy of summons at the defendant's residence, and latterly a posting or publication of notice of the pendency of the suit or proceeding, when the defendant was out of the state or upon due inquiry could not be found, or when he concealed himself so that process could not be served upon him.

In *Bardwell v. Collins*, 44 Minn. 97, 20 Am. St. Rep. 46 N. W. 315, 9 L. R. A. 152, the supreme court of Minnesota said: "We think that from the earliest period of English jurisprudence down to the present, as well as in the jurisprudence of the United States derived from that of England, it has always been considered a cardinal and fundamental principle that in actions in personam proceeding according to the course of the common law, personal service (or its equivalent, as by leaving a copy at his usual place of abode) of the writ, process or summons must be made on all defendants resident and to be found within the jurisdiction of the court. We do not mean that the term 'proceeding according to the course of the common law,' as used in the books, is to be understood as meaning, necessarily and always, personal or actual service of process, for although service by publication is of modern origin, there has always been some mode in which jurisdiction has been obtained at common law when something amounting to or equivalent to constructive service, where the defendant could not be found and served personally; but what we do mean to assert is, that the right to resort to such constructive or substituted service in personal actions proceeding according to the course of the common law rests upon the necessities of the case, and has always been limited and restricted to cases where personal service could not be made because the defendant was a nonresident or had absconded, or had concealed himself for the purpose

of avoiding service. As showing what means were resorted to as amounting or equivalent to constructive service, and how strictly it was <sup>210</sup> limited to cases of necessity by both courts of common law and courts of chancery, reference need only be had to 3 Blackstone's Commentaries, 283, 444."

While the authorities are not in entire harmony upon the subject, the Illinois cases and the greater weight of authority clearly establish, we think, the proposition that a personal judgment in an action at law may be rendered against a defendant residing in and who is in the state where the suit or proceeding is pending, who has been notified of the pendency of the suit by constructive service of process, where it appears actual service of process could not be had upon the defendant, if the constructive service provided for was required to be had in such manner that the reasonable probabilities were that the defendant would receive notice of the pending action or proceeding before judgment or decree was rendered against him.

A full discussion of the subject of the right of a court to render a personal judgment or decree against a defendant upon constructive service of process will be found in an exhaustive note to the case of Pinney v. Providence Loan etc. Co., 106 Wis. 396, 80 Am. St. Rep. 41, 82 N. W. 308, 50 L. R. A. 577. The learned author says: "As is shown by the cases cited in the preceding subdivision, the court cannot acquire jurisdiction, by constructive or substituted service of process, to render a personal judgment against a nonresident defendant who does not appear, unless he can be deemed to have assented to such mode of service; but the rule is otherwise with respect to resident defendants—at least if they are within the state at the time of the attempted service. The manner of serving process must necessarily be regulated by every country for itself, and if a state permits process to be served upon one of its own citizens by the leaving of it, in his absence, at his domicile with an adult member of his household, that method of service is not so repugnant to the principles of natural justice that a foreign tribunal should refuse to recognize it and treat a sentence founded on it as <sup>211</sup> a nullity. . . . The following cases expressly hold that it is competent for the legislature to authorize personal judgments against residents of the state upon constructive or substituted service of process, under proper conditions: Betan-

court v. Eberlin (1882), 71 Ala. 461 (personal judgment attachment); Fleming v. West (1896), 98 Ga. 778, 27 S. 157 (judgment for alimony); Bimeler v. Dawson (1849), Scam. 536, 39 Am. Dec. 430; Bickerdike v. Allen, 157 1 95, 29 L. R. A. 782, 41 N. E. 740; Sturgis v. Fay (186 16 Ind. 429, 79 Am. Dec. 440; Beard v. Beard, 21 Ind. 3 (obiter); Weaver v. Boggs (1873), 38 Md. 255 (obiter); H ryman v. Roberts (1879), 52 Md. 64; Continental Nat. Ba v. Thurber, 74 Hun, 632, 26 N. Y. Supp. 956; affirmed 143 N. Y. 648, 37 N. E. 828; Northcraft v. Oliver (188 74 Tex. 162, 11 S. W. 1121; Town of Hinckley v. Kettle Riv R. R. Co., 70 Minn. 105, 72 N. W. 835."

We are of the opinion that the constructive service process provided for in paragraph 5 of the practice act, wh taken in connection with sections 12 and 13 of the chance act, constitutes due process of law when it appears, as must before such service can be had, by the return of t officer, that the incorporated railroad company against wh the suit is brought has no officer or agent in the county which the suit is brought with whom a copy of the summe can be left to effect service upon the railroad company, a it further appears the principal office of the railroad co pany is in the state of Illinois.

The judgment of the circuit court will therefore be versed and the cause remanded to that court for further p ceedings in accordance with the views herein expressed.

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*A Statute which Provides for Constructive Service of Summons* certain actions, but fails to require personal service thereof on kno defendants residing within the county, is in conflict with the c stitutional provision that no man shall be deprived of life, liber or property without due process of law: Bear Lake County v. Buc 9 Idaho, 703, 108 Am. St. Rep. 179. See, too, Bardwell v. Collins, Minn. 97, 20 Am. St. Rep. 547. And, while the legislature may thori ze constructive service of process upon corporations, especia when the action concerns property located within the state, method adopted should be reasonably calculated to bring notice h to some of the officers or agents of the corporation, thus secur an opportunity to be heard and to make a defense: Finney v. Fr dence Loan etc. Co., 106 Wis. 396, 80 Am. St. Rep. 41.

## CHENEY v. GOLDY.

[225 Ill. 394, 80 N. E. 289.]

**WILLS—Undue Influence—Directing Verdict.**—Whether the court committed error in directing the jury to find for the proponents in a will contest does not involve any question as to the preponderance of the evidence or the credibility of the witnesses, or the force to be given to the evidence having a tendency merely to impeach the veracity of the witnesses, but only whether there was any evidence fairly tending to sustain the allegations of the bill with respect to undue influence and want of capacity in the testator as charged. (p. 146.)

**WILLS—Undue Influence—Directing Verdict.**—The active agency of the beneficiary of a will in procuring it to be drawn, especially in the absence of those who have at least equal claims upon the justice of the testator, and where the testator is enfeebled by old age and long-continued disease calculated to weaken his mental faculties, are circumstances indicating the probable exercise of undue influence, and in such case it is error for the court to peremptorily direct the jury to find a verdict for the proponents of the will. (p. 149.)

**WILLS—Undue Influence.**—Proof of undue influence in the execution of a will which will invalidate it may be wholly circumstantial and inferential, and the influence may be that of a third person as well as of direct beneficiaries. (pp. 149, 150.)

**WILLS—Undue Influence—Evidence.**—If a will disposing of the testator's property to strangers is sought to be set aside for undue influence or want of mental capacity, evidence tending to show that friendly relations existed between the deceased and some of his relatives is admissible. (p. 150.)

**WILLS—Evidence to Show Undue Influence or Want of Testamentary Capacity.**—Declarations made at different periods of his life by a testator as to his views and intentions as to the disposition of his property may be introduced in evidence if consistent with the provisions of his will, but not to invalidate the will as having been made under undue influence. (p. 150.)

T. Durham, H. S. Osborne and S. W. Packard, for the appellants.

Lackner, Butz & Miller, for the appellees.

<sup>395</sup> **FARMER, J.** This is an appeal from the circuit court of Cook county to reverse a decree of that court dismissing a bill by appellants and others against appellees to contest the last will and testament of Isaiah Goldy, deceased.

Isaiah Goldy, a bachelor, eighty-three years of age, died in the city of Chicago on the twenty-fifth day of February, 1905, and by his alleged last will and testament of date February 22, 1905, bequeathed and devised his entire estate, valued at seventy-five thousand dollars, unto Elsie Rose Goldy

and Walter Isaiah Goldy, <sup>396</sup> children of Mrs. Clara Goldy. Though bearing the same family name, the devisees and legatees were not of kin to the testator. The bill alleged that Achsah Goldy Cheney and thirty-one nephews, nieces, grandnephews and grandnieces, the complainants, were the heirs at law and next of kin of the deceased; that said Walter Isaiah Goldy was at the time of executing the supposed will of unsound mind and memory and wholly incapable of making any just and proper distribution of his property; that Clara J. Goldy and Elsie Goldy unduly influenced the deceased in the execution of the will; that said Elsie Rose Goldy and said Walter Isaiah Goldy, the two sole legatees in the pretended will, were not related in any way to the said Walter Isaiah Goldy nor to any of the complainants, and that said Clara J. Goldy, mother of the legatees and devisees, both of whom were minors, conspired with George N. Sandberg to secure the entire estate of the deceased for the devisees in the will. The issue of law was made up as provided by the statute submitted to a jury whether the writing produced was the will of the testator or not. Appellees introduced in evidence certificates of oaths of the subscribing witnesses at the date of the will, June 30, 1904, and both parties offered evidence in support of and against the allegations of the bill. At the close of all the evidence the trial court peremptorily instructed the jury to find the issues in favor of appellees.

It is urged by appellants that the court erred in giving the peremptory instruction to find for the proponents of the bill. The determination of the question whether the court properly gave the instruction does not involve any question as to the preponderance of the evidence or the credibility of the witnesses, or the force to be given to the evidence having a tendency merely to impeach the veracity of the witnesses. The only question is, Was there evidence fairly tending to prove the allegations of the bill that the deceased was at the time of the execution of the will of unsound mind and memory or that he was unduly influenced in the execution of the <sup>397</sup> will: *Woodman v. Illinois Trust etc. Bank*, 211 Ill. 71 N. E. 1099, and cases there cited.

In August, 1904, the deceased, then of the age of eight years and three months, went to the home of Clara J. Goldy, at 123 North Clark street, in the city of Chicago, to board, paid for his board while there the sum of six dollars a week.

evidence tends to show there was not any relationship whatever between Mrs. Goldy and her children and the decedent. On February 4, 1905, the deceased seriously injured his leg and was taken to his room in Mrs. Goldy's flat, where he remained in bed until he departed this life, three weeks later. None of his relatives were in Chicago nor were they notified of his illness. Clara J. Goldy, the mother of the two beneficiaries in the will (one a boy ten years of age, the other a girl of seventeen), testified that on Sunday afternoon before the death of Mr. Goldy he was seized with violent pains and began to scream and throw up his hands, and said, "Oh, my God! This is death! This is surely death!" that she asked him if she should ship his body back east, and he told her, "No; do as you think best; I shall leave it all to you"; that she said, "You have made your will?" and he replied, "No, and I fear it is too late," but that she assured him it was not and that he could "send for some one when this paroxysm is over," and that he told her to do so at once. Mrs. Goldy testified she then sent her daughter to a neighbor to inquire for some one competent to make a will, and not finding the person sought, the daughter went to get Mr. Sandberg, a former employer of hers, who was a notary public, and that in response to her request Mr. and Mrs. Sandberg and Mr. Julin, the father in law of Sandberg, all of whom were strangers to Mr. Goldy, came and were introduced to him on their arrival. Sandberg claimed to be unable to write a will, and his father in law, Mr. Julin, a real estate agent, was brought for that purpose. Julin testified he stayed with the deceased about one-half hour and talked with him about the disposition of his property by will, and after receiving ~~the~~ directions from him as to how it should be written he went to the room where Mrs. Goldy was waiting, and asked his daughter, Mrs. Sandberg, to write the will as he dictated it. The witnesses present testified the deceased was asleep when they had finished drawing the will; that they waited until after 10 o'clock that night, but as he was still sleeping decided to wait until the next morning to have the will signed. It was further testified to on behalf of appellees that the next morning, February 22, 1905, Mrs. Goldy handed the will to deceased and he started to read it, but returned it to her to read for him, which she did. She testified he said it was all right, and signed it by making three crosses at the

foot thereof. Mr. Goldy was very weak at that time, and when he so signed the instrument Mrs. Goldy held his arm and assisted him in making the crosses. Elsie Goldy, the daughter, had possession of the will the night before it was signed and kept it until the next morning, and then gave it to her mother when Mr. Goldy inquired for it. Mrs. Goldy requested Mrs. Hurlock to be a witness to the will, and sent her daughter, Elsie, to get a brother of Mrs. Goldy to be the other witness.

Dr. Manierre, a witness in behalf of the proponents, who attended the deceased during his last illness, testified that he called on him on the 19th and 21st of February and found him having severe pains. "He would have a paroxysm lasting some little time, then a rest." The doctor gave him some morphine on the 19th. On the 21st he gave some morphine tablets and left a prescription with Mrs. Goldy for one-quarter grain morphine pills. On the 22d, the day the will was executed, the doctor visited him three times on account of the severe pain he was suffering, and at 3 o'clock on the morning of February 23d Elsie Goldy called at the doctor's office for medicine for pain deceased was having, and he gave her some morphine tablets to be given him for quieting the pain. The doctor testified the cause of Mr. Goldy's death was an enlargement and inflammation of the <sup>300</sup> prostate gland, and inflammation of the bladder, and uraemia. The doctor further testified: "The last two days the deceased kept repeating over some phrase like 'Applonia' or 'Abolonia.' The man was, of course, incapable, as near as I could judge, of conducting ordinary business, but I say he was capable of making a will because that is extraordinary, as I understand it, in the eyes of the law. He could answer any question up to a certain point very clearly. It was just a matter of speaking to him so that he comprehended it. He was very deaf."

The evidence further shows that uraemia is the absorp<sup>ti</sup>on of the contents of the urine into the blood, poisoning the blood. It affects the mind, produces delirium and coma and weakens the resistance of the mental faculties; and also that morphine taken from day to day has a similar effect. I. M. Ridlehuber testified that he saw the testator on Saturday before the will was signed on Monday and found him delirious; that he saw him again on Monday night, the day



on which the will was signed, and that he was then "delirious, raving and nude"; that the witness assisted in quieting him to some extent, and went to his (witness') home for a short time and then returned, and found deceased a little more quiet "but talking all the time"; that he said a great many things to which the witness paid no attention, and that he used an expression that sounded to the witness like "I axie her," many times. This same witness saw Mr. Goldy on the afternoon before that, and he was in about the same condition and seemed to be delirious. It was further developed by the evidence that Mr. Goldy was well educated and could write—in fact he was a business man who had transacted many business affairs and accumulated his fortune thereby. The proof relied on by proponents shows his signature was made to the will by making three crosses (X X X), and that these crosses were made while Mrs. Goldy held his arm and directed its movements. His name had not then been written to the will. Later, on the same <sup>400</sup> day but not in the presence or with the knowledge of the deceased, one Mabel Sandberg wrote the word "Isaiah" before the three crosses and the word "Goldy" after the crosses. None of his relatives were in Chicago at this time, and among those who took an active part in procuring the execution of the will were Mrs. Goldy (his landlady) and her daughter, the latter being one of the two beneficiaries in the will.

Taking this evidence as true, and all the reasonable inferences and intendments to be drawn therefrom, it cannot be seriously contended there was not any evidence before the jury fairly tending to establish the allegations of the bill that the decedent was, at the time he signed the will, of unsound mind and memory and that he was unduly influenced in the execution of the same. "Where a will is written, or procured to be written, by a person largely benefited by it, such circumstance excites stricter scrutiny and requires stricter proof of volition and capacity. The proof required in such cases must be such as to fully satisfy the court or jury that the testator was not imposed upon, but knew what he was doing and what disposition he was making of his property when he made his will. The active agency of the beneficiary of a will in procuring it to be drawn, especially in the absence of those who have at least equal claims

upon the justice of the testator, and where the testator is enfeebled by old age and disease, is a circumstance which indicates the probable exercise of undue influence. Where the mind is wearied and debilitated by long-continued and serious and painful sickness it is susceptible to undue influence and is liable to be imposed upon by fraud and misrepresentation": *England v. Fawbush*, 204 Ill. 384, 68 N. E. 526. Proof of undue influence may be wholly circumstantial and inferential, and the influence may be that of a third person as well as that of direct beneficiaries; that is, if the will was the result of undue influence on the part of Mrs. Goldy, the mother of the beneficiaries, this would invalidate the will.

<sup>401</sup> Complaint is made that the court erred in excluding proper testimony offered on behalf of the appellants tending to show that friendly relations existed between the deceased and some of his relatives. We have held such evidence competent as bearing upon the issues where a will is sought to be impeached for mental incapacity of the testator or undue influence practiced upon him: *McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145; *Piper v. Andricks*, 209 Ill. 564, 71 N. E. 18.

Appellants also offered evidence, which was held inadmissible by the trial court, of declarations made by the deceased to the effect that he intended to divide his property among his relatives in the east. Declarations at different periods of life as to the views and intentions of the testator in the disposition of his property may be introduced if consistent with the provisions of the will, but are not competent to be considered to invalidate a will as having been made under undue influence: *Compher v. Browning*, 219 Ill. 429, 109 Am. St. Rep. 346, 76 N. E. 678. Declarations may be competent if such as have a tendency to show mental condition of the testator, but it is not contended that any such declarations were excluded.

The contention of the appellants that the court erred in not allowing Walter S. Goldy to testify as to facts occurring after the death of said Isaiah Goldy is not presented for consideration. The testimony of this alleged witness, or what questions were propounded to him, does not appear in the abstract of the testimony, nor does the abstract show that Walter S. Goldy was called or testified as a witness.

The trial court erred in giving the peremptory instruction to the jury and in ruling as to the admissibility of evidence, as indicated herein. The decree dismissing the bill must be, and accordingly is, reversed and the cause remanded to the circuit court of Cook county for further proceedings not inconsistent with the views here expressed.

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*Undue Influence Exercised by Anyone*, whether he or another gains by its exercise, renders the will thus procured invalid: *Carroll v. Hause*, 43 N. J. Eq. 269, 27 Am. St. Rep. 469; note to *In re Hess' Will*, 31 Am. St. Rep. 672.

On the *Admissibility of the Declarations of a Testator* to sustain, defeat, or aid in the construction of his alleged will, see the recent note to *Estate of Colbert*, 107 Am. St. Rep. 459.

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### STERN v. SMITH & COMPANY.

[225 Ill. 430, 80 N. E. 307.]

**BANKRUPTCY—New Promise.**—One who, after being discharged in bankruptcy, promises to pay a note which was included among the debts from which he was discharged is liable therefor, and in this connection the word "promised," standing alone, means a definite, express, distinct and unconditional promise. (p. 152.)

**BANKRUPTCY.—Mere Payment of Interest** upon a note, secured by trust deed, after the maker has been discharged thereon as a bankrupt, does not raise a presumption that such payment was made to protect the real estate security. (p. 154.)

**BANKRUPTCY—Divestment of Title—Burden of Proof.**—If the maker of a note secured by deed of trust is discharged from liability thereon by bankruptcy proceedings and suit is afterward brought on his new promise to pay the note, the fact that the record does not show that a trustee in bankruptcy was appointed does not justify his contention that the title to the encumbered property was not divested by the bankruptcy proceedings. The appointment of such trustee is presumed, and the burden of proof is upon the bankrupt to disprove it. (p. 154.)

**BANKRUPTCY—New Promise.**—A promise by the maker of a note bearing interest, after he has been discharged in bankruptcy, to pay the note in full, revives the debt in full on the original consideration, and covers not only the principal, but also the interest due. (pp. 154, 155.)

Action to recover the amount of an interest-bearing note secured by trust deed, from the payment of which the maker had been discharged by bankruptcy proceedings. Thereafter he made a new promise to pay the debt in full. Judgment for plaintiff and defendant appealed.

D. K. Tone and R. F. Stern, for the appellant.

C. H. Stevenson and P. H. Bishop, for the appellee.

<sup>432</sup> CARTER, J. At the close of all the evidence, and before the case had been argued, counsel for appellant asked to have the jury instructed to find for the defendant. This was refused, and this ruling is urged as error.

Under the statute, as construed by this court, all controverted questions of fact are settled by the judgment of the appellate court when it approves the verdict of the jury. This court has held many times that on instructions to find for the defendant the only thing that can be reviewed in this court is whether there is any evidence fairly tending to support the plaintiff's cause of action. In such case we cannot consider the weight of the testimony: Chicago etc. R. R. Co. v. Snedaker, 223 Ill. 395, 79 N. E. 169, and cases there cited. As there was evidence fairly tending to support the plaintiff's cause of action we can only consider in this case whether the law was properly applied as to the admission and exclusion of evidence and in the giving of instructions.

Appellant insists that the giving of the first instruction for appellee was prejudicial error. That instruction reads: "The jury are instructed that if they believe, from the evidence, that after the defendant received his discharge in bankruptcy he promised the plaintiff that he would pay it <sup>433</sup> the amount then remaining unpaid upon the note which has been introduced in evidence, then the jury should find the issues for the plaintiff."

It is argued that the new promise must be definite, express and distinct; that the promise cannot be conditional unless the proof shows that the condition was accepted or complied with. This we understand to be the law: Collier on Bankruptcy, 5th ed., p. 217; Brandenburg on Bankruptcy, 3d ed., sec. 391.

It is contended that this instruction must stand or fall by itself; that as it practically directs a verdict it cannot be taken in connection with the series of instructions in order to find its meaning, but must embrace all the facts essential to a recovery upon the theory on which the case is tried: Illinois Cent. R. R. Co. v. Smith, 208 Ill. 608, 70 N. E. 628. It is claimed that this instruction does not comply with the rule laid down in the authority last cited because it does not say that the promise must be distinct, express, and not based on

condition. We do not so understand the meaning of the word "promised." The word, standing by itself, without any modifying words, means a distinct, express, unambiguous and unconditional promise. It means a declaration made by one person to another, for a good or valuable consideration, by which the promisor binds himself to do or forbear some act, and gives to the promisee a legal right to enforce fulfillment. To promise is to agree: 23 Am. & Eng. Ency. Law, 2d ed., p. 231. To the same effect are the Century Dictionary and other standard authorities as to the meaning of this word. The instruction would not have been made any clearer in expressing the idea contended for by appellee if there had been inserted before the word "promised" the words "directly, unequivocally, expressly and without condition." Standing by itself, the instruction states within its four corners "all of the essential facts necessary to be proved, under the pleadings in this case, for the plaintiff to recover. It is true that other instructions given for the appellant <sup>434</sup> set out, in terms, that the promise must be clear, direct, unequivocal and without condition. These do not in any way conflict with the instruction here under discussion but are in entire harmony therewith. Nothing is said in any of the authorities cited by appellant on this question, when these authorities are weighed and considered in the light of the special facts under consideration in each case, that in any way conflicts with this holding.

Complaint is made of the refusal of certain instructions asked on behalf of appellant. These instructions attempted to set out certain evidence offered in his behalf on the trial below which tended to show that he and his attorney had certain conversations with a representative of the appellee, wherein appellant offered to appellee to give a new note for the old debt, provided appellee would return certain certificates of stock which it held and in which appellant was interested. H. T. Smith, treasurer of appellee company, testified that a few days after appellant's petition in bankruptcy was filed he had a talk with appellant, in which the latter said he wished to go through bankruptcy mainly to get rid of some debts which he had indorsed for his brother, but that such course would not affect his indebtedness to appellee; that he would pay that debt in full, considering it one of honor; that his promise was repeated by appellant to the witness on several occasions when they met, sometimes the statement being

that he would pay the note in full or that he would pay the debt in full. Appellant testified that he never, at any time or place, promised to pay the note, but that he had attempted to get a conditional settlement. However, he and his lawyer, who testified for him, both admit that the conditional offer of settlement was never accepted by the appellant. In view of this fact the refusal of these instructions in the form they were drawn, attempting to set out this conditional offer, could not have harmed appellant. All of these instructions were objectionable also on the ground that they isolated facts and called attention to them—a practice which has often <sup>435</sup> been condemned by this court as calculated to mislead the jury: *Weston v. Teufel*, 213 Ill. 291, 72 N. E. 908, and cases there cited.

The claim on behalf of appellant that the payment of interest on the note after the petition in bankruptcy was filed was to protect the real estate mortgaged to secure it cannot have the effect, on the issues, here contended for, as the bankruptcy proceedings divested appellant of his title to the real estate in question. There is no evidence that these payments of interest were made for that purpose, and no such inference can be drawn from the mere fact of payment.

Appellant's contention that the title to this property was not divested because there is nothing to show the appointment of a trustee in the bankruptcy proceedings, and that such appointment was prerequisite to the divesting of the title, cannot avail. There is nothing in the record to indicate whether there was or was not such appointment. The law requires it, and the burden was upon appellant to prove that no such appointment was made. This being the case, there was no error in refusing instruction 13 for appellant.

Appellant also complains that the court refused to permit him to answer certain questions with reference to the new promise made with reference to this five thousand dollar note. It is clear from the questions that were asked and answered that this testimony had already been fully gone over, as the trial court said, and therefore there was no error in refusing to allow him to restate it.

It is next insisted that the verdict is excessive; that the face of the note was for only five thousand dollars and that the new promise was only to pay the note in full, while the judgment is for principal and interest. As we have heretofore stated, the testimony tends to show that in the course

the conversation testified to, appellant promised to pay the debt in full or the note in full. If he paid the debt in full or the note in full, as will be seen by reading the copy of the note set out in the statement of the case, he must have promised to pay both principal and interest. The interest made payable by <sup>436</sup> such a contract is as much a part of the debt as is the principal: 16 Am. & Eng. Ency. Law, 2d ed., 999-1073. Manifestly, under all well-considered authorities, the effect of the new promise revives the debt barred by the discharge. The original cause of action is not destroyed by the bankruptcy proceedings. The debt is revived on the original consideration. A debt discharged is not a debt paid, as the moral obligation remains and is held by all the authorities to be a sufficient consideration for a new promise: Collier on Bankruptcy, 5th ed., p. 217. The debt is due in conscience though discharged in law. This moral obligation, uniting with a subsequent promise by the bankrupt to pay the debt, gives a right of action: Lump on Bankruptcy, 11th ed., p. 716. This court has held that the only effect of the discharge in bankruptcy is to suspend the right of action against the bankrupt in person; it does not annul the original debt of the debtor. No one can plead the discharge except the bankrupt himself, and he may, if he chooses, waive the right or avoid it by a new promise: Mallin v. Wenham, 209 Ill. 252, 101 Am. St. Rep. 33, 70 N. E. 654, 65 L. R. A. 602, and cases there cited. There is nothing in Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 854, cited by appellant, that in any way conflicts with the decisions of this court on the effect of the discharge in bankruptcy and the nature of the promise to revive such a debt.

We find no reversible error in the admission or exclusion of testimony nor in the giving or refusal of instructions.

As there was evidence in the record which fairly tended to prove that a new promise had been made by appellant which revived the debt, after the proceedings in bankruptcy had been commenced, the judgment of the appellate court on these facts is conclusive upon this court. The judgment of that court will therefore be affirmed.

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*The Effect of a Discharge in Bankruptcy* is but a personal release, and does not exonerate the effects of the debt to which a valid lien has attached and which is not expressly annulled by the bankruptcy statute: Mallin v. Wenham, 209 Ill. 252, 101 Am. St. Rep. 33.

## PEOPLE v. CLEAN STREET COMPANY.

[225 Ill. 470, 80 N. E. 298.]

**MUNICIPAL CORPORATIONS—Control of Streets—Delegation of Power.**—A city council has absolute control over the city streets and power to keep them clean, but it cannot delegate such power to anyone, nor by ordinance or otherwise appropriate a portion of a street to the use and benefit of a private person. (p. 157.)

**MUNICIPAL CORPORATIONS—Cleaning Streets—Delegation of Power.**—A municipal ordinance authorizing certain city officials to take such steps as they may deem effective to prevent the casting of waste paper and other litter upon the streets, to provide for the erection of suitable boxes for such litter and for cleaning such boxes and to enter into any contract for a term not exceeding fifteen years for the purpose of accomplishing such object, is void as an illegal delegation of power. (p. 159.)

**MUNICIPAL CORPORATIONS—Cleaning Streets—Delegation of Power.**—A contract under a municipal ordinance giving a person full control and authority over the outside surface of street litter and waste boxes, to rent or sell it for advertising purposes to anyone he saw fit, at such prices as he chose, and to account to the city for a certain portion of the amount received is void, as an unlawful delegation of power and as turning over the exclusive use of portion of the street for the benefit of private individuals. (p. 159.)

**JURISDICTION—Supreme Court—Validity of Ordinance.**—The state supreme court has jurisdiction of a direct appeal involving the validity of a municipal ordinance, when the determination of such validity involves a construction of the state constitution. (p. 162.)

J. J. Healy, state's attorney, and West, Eckhart & Taylor, for the appellants.

J. H. Lewis, corporation counsel, Winston, Payne Strawn, J. B. Payne, M. Hoyne and M. F. Sullivan, for the appellees.

478 WILKIN, J. The first question for our determination is the validity of the ordinance which is the basis of the contract entered into between the city and Jenney. It is claimed by appellants that it is void because it seeks to delegate to the mayor, chairman of the finance committee and commissioner of public works discretionary power which is vested solely in the city council.

Section 62 of the city and village act authorizes city authorities to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds and vacate the same; to plant trees upon the same; to prevent and remove encroachments or obstructions upon the same; to provide



or the cleansing of the same; to regulate the use of sidewalks and all structures thereunder; and to require the owner or occupant of any premises to keep the sidewalks in front of or alongside the same free from snow and other obstructions; to regulate and prevent the throwing or depositing of ashes or garbage, or any offensive matter, in, and to prevent injury to, any street, avenue, alley or public ground

<sup>479</sup> It will be seen that the control over the streets and alleys of a city or village, under this statute, is very broad, and absolute power over them is vested in the municipality. But the authority is not vested in the mayor, chairman of the committee on finance or commissioner of public works, but is conferred upon the legislative branch of the city government. In other words, it is vested in the city council, and can only be exercised by it through ordinances duly passed.

The ordinances may, of course, be enforced or carried into effect after they are so passed, by the mayor or other officials designated for that purpose. It is a well-known rule of law that the city council cannot delegate to any of its officers discretionary authority which is vested by statute or charter in it. In the American and English Encyclopedia of Law (volume 20, second edition, page 1217) the rule is announced as follows: "The governing body of a municipal corporation is not at liberty to delegate to a committee, or an officer or agent, governmental, legislative or discretionary functions confided to it by the legislature of the state, in the absence of express authority for such delegation." To the same effect see Cooley's Constitutional Limitations, fifth edition, page 249, and Dillon on Municipal Corporations, third edition, sections 96, 97.

The question has been before this court on many occasions and uniformly decided in conformity with the rule above stated. In the early case of *City of East St. Louis v. Wehrung*, 50 Ill. 28, the charter of the city of East St. Louis conferred upon the city council power to regulate the selling of spirituous liquor. The council passed an ordinance prohibiting the sale of spirituous liquor, under penalty, without a license, and the city treasurer was authorized to grant the license, to fix the amount to be paid therefor, and, with the concurrence of the mayor, to reject any application for the same, and in the decision of the case on this point we said (page 31): "The ordinance under which this proceeding was instituted delegates to the treasurer of the city the power to

determine the amount that each applicant for a license shall<sup>480</sup> pay, not less than fifty dollars for six months. As a general rule, where power is conferred upon a municipal corporation to regulate any calling or business, they are powerless to delegate a discretionary authority to others or to an individual. In creating such bodies it is designed to aid the government in the preservation of good order, and to protect more effectually persons in the particular community from injuries and annoyances that cannot be so readily guarded against by the general laws of the state. And in conferring the power upon the corporate body it is with the intention that it shall be exercised by the body created and in the mode prescribed, and any departure from such authority or any attempt by the body to transfer their power to others is unwarranted. . . . If the treasurer may, under this ordinance, refuse licenses with the concurrence of the mayor, then they, and not the city council, would regulate or suppress dramshops; and if the treasurer may, in his discretion, fix the sum to be paid, then he, and not the city council, would discharge the duty." To the same effect, see *City of Chicago v. Stratton*, 162 Ill. 494, 53 Am. St. Rep. 322, 54 N. E. 853, 35 L. R. A. 84; *People v. McWethy*, 177 Ill. 334, 52 N. E. 479; *Lindblad v. Board of Education*, 221 Ill. 261, 77 N. E. 450; *Wilder v. Aurora Electric Traction Co.* 216 Ill. 493, 75 N. E. 194.

This ordinance authorized the three city officials therein named, or a majority of them, to take such steps as they might deem effective to prevent the casting of waste paper and other litter upon the streets, in violation of the existing ordinances of the city, and to take such action as they might deem proper for the erection upon the streets of suitable boxes for the collection of such litter, and to provide for the cleaning of and keeping clean such boxes, and to enter into any contract, for a term not to exceed fifteen years, for the purpose of accomplishing said object. An ordinance could not well be drawn giving greater power and authority to a set of officials than was done by this one. By its terms the officials were not even given general directions as to the manner in which they were to exercise the power conferred<sup>481</sup> upon them. The only limitations were, that the contract was not to be for a longer period than fifteen years and that the city was not to be made liable to pay for the erection or maintenance of the boxes. Outside of these limitations the

Officials were authorized to place obstructions in the street at any places they might see fit, of any size or any character. It cannot be seriously contended that this was not a governmental and legislative function delegated to the city council by virtue of section 62, supra, and such power as the city council was only authorized to exercise by virtue of an ordinance properly passed, providing for at least the general conditions under which the work should be done. The city council had control over its streets and alleys, with full power to keep them clean. But that power and duty could not be delegated to others. The defense, therefore, that the method adopted by the city of Chicago for disposing of the waste paper and other rubbish accumulating upon its streets was the most practicable and effective means of so doing, and all of the argument based on that defense, cannot avail against the express provisions of the statute and the firmly established rule above set forth, and, however potent it might be if addressed to the legislature, can have no controlling influence upon our decision. The ordinance was valid, and the trial court should have so held.

We find nothing in the case of *Savage v. City of Salem*, 101 Or. 381, 37 Am. St. Rep. 688, 31 Pac. 832, 24 L. R. A. 787, which our attention has been called since the submission, which militates against this conclusion.

The contract entered into with Jenney was to run for a term of ten years, unless sooner terminated, and it rested upon the said ordinance. It (the contract) provided that he should have full control and authority over the outside surface of the boxes, and might rent or sell it for advertising purposes to anyone he saw fit, the only limitation upon that right being that no advertisement should appear upon the boxes which was of an immoral or disreputable character. He was permitted to charge for such advertisements <sup>482</sup> such prices as he might see fit, but was to account to the city for a certain portion of the amount received. By this contract he was authorized to use the streets and public places of the city for the purpose of advertising the private business of any person or corporation, and have exclusive control over the same. The city authorities had no power to grant or delegate any such right or privilege. While the title to the streets and alleys of a city is vested in the city and it has full power and control over them, yet this authority must be exercised according to well-established rules

of law. The public authorities are merely the custodians or trustees for the public, which must be given the full use and enjoyment of all such streets without obstruction, and without authority of the city council to use or encroach upon them, or to authorize others to do so for purely private purposes. By the ordinance and contract the city authorities sought and attempted to turn over the use of certain portions of the street for the exclusive benefit of private individuals, and their action in this regard must be held illegal and void.

In the case of *State v. City of St. Louis*, 161 Mo. 371, 63 W. 658, the question here involved was before the supreme court of that state and the foregoing view sustained. In that case it appears that the municipal assembly of the city of St. Louis passed an ordinance purporting to authorize a board of public improvements to maintain boxes similar to those in question, and to enter into a contract with Fred Belt for the erection and maintenance of the same. Belt was to have the right to use the outside of all boxes for advertising purposes, and was to pay into the city treasury, at the end of each quarter, fifteen per cent of the gross receipts. The principal controversy was as to the authority of the municipal assembly or the board of public improvements under the charter, in disposing of which the court, among other things, said: "But there is another view to be taken of this ordinance. It subjects the public streets to a purpose of private purpose, to wit, the advertising of the individual business <sup>483</sup> and enterprises. Can the city devote its streets to such purpose? We hold that it cannot. The charter gives the city power to regulate the use of the streets. Under this grant it may, it is true, not only regulate travel thereon, but it may allow gas, water and sewer pipes to be laid therein and permit telegraph and telephone poles to be erected therein. But all of these uses are consistent with the use for which they are dedicated or condemned. . . . Referring now to the ordinance, it will be observed that it confers upon Belt the exclusive right to place advertisements on such boxes for the benefit of himself and his assigns. In a word, the city has attempted to farm out its sidewalks and streets to a private person for advertising. Belt is free to make his own charges for advertising. The power is reserved to the city, even if it were a purpose for which it could devote the streets, to regulate the character for advertisements. . . . But it is said that it is no objection

to a public franchise that its owner may derive a private benefit therefrom. This is unquestionably true when the use is for a public, and the gain arises out of that use, such as streets, telegraph and telephone lines. In this case, however, the pecuniary profits to Belt arise from a source wholly distinct from any public use. They will not flow naturally from his right to erect and maintain boxes for waste paper, but solely from a distinct privilege in which the public are not interested, to wit, his exclusive right to use the streets for advertising purposes, and purely provide a collateral enterprise. We are clear that the streets cannot be devoted to such a private purpose."

The foregoing reasoning and conclusion are, in our opinion, unanswerable. The ordinance in this case, which is the basis of the contract, and the subsequent resolution of the city council, clearly attempt to confer upon George H. Jenney and the Clean Street Company the special privilege of using the public streets and sidewalks for advertising purposes. Section 22 of article 4 of the constitution of 1870 forbids any such ordinance, contract or resolution.

<sup>1884</sup> Other questions were presented and discussed, such as whether the boxes are a nuisance, whether they are purposes, and whether or not a court of equity will assume jurisdiction of the cause before they have been declared to be a nuisance by a jury. No good purpose would be served in considering these points, as the questions already considered, in our opinion, are conclusive of the case and must determine it contrary to the finding of the trial court.

Some doubt was expressed at the oral argument whether the appeal was properly taken directly to this court. No such point is made by counsel for appellees in their printed briefs and argument, but as the question goes to our jurisdiction we have given it consideration. The ground upon which the appeal was taken to the supreme court doubtless was that it involved the validity of said ordinance and resolution of the city council, and the contract, under the provisions of the constitution. It is provided by section 22 of article 4, *supra*, of the constitution, that the General Assembly shall not pass a law granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. Ordinances of municipal corporations must be in harmony with the constitution, and in conflict therewith they are void: *Hibbard & Co. v. City*

of Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621. If the validity of an ordinance involves a construction of the constitution, this court has jurisdiction on direct appeal, under section 88 of the practice act: *Wood v. City of Chicago*, 205 Ill. 70, 68 N. E. 712, and cases cited; *People v. Harrison*, 223 Ill. 540, 79 N. E. 164. The appeal was properly taken from the circuit court directly to this court.

The decree of the circuit court will be reversed and the cause remanded for further proceedings in accordance with the views above expressed.

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*A Municipal Corporation cannot Delegate Powers conferred upon it of a governmental, legislative or discretionary character: Eureka City v. Wilson*, 15 Utah, 67, 62 Am. St. Rep. 904; *Chicago v. Stratton*, 162 Ill. 494, 53 Am. St. Rep. 325; *Lynch v. Forbes*, 161 Mass. 302, 42 Am. St. Rep. 402; note to *Davis v. King*, 50 Am. St. Rep. 118. Thus, the legislative department of a city cannot delegate to any officer or body the authority to determine the necessity of making a street improvement, or the extent or character of any improvement which it may itself direct to be made: *Bolton v. Gilleran*, 105 Cal. 244, 45 Am. St. Rep. 33.

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## DOUGLAS v. PEOPLE.

[225 Ill. 536, 80 N. E. 341.]

**CONSTITUTIONAL LAW—Police Power—Right to Engage in Business or Work.**—The right of the citizen to follow any legitimate business, calling or occupation which he may see fit to engage in, and to use such right as a means of livelihood, is subject to the paramount right of the state to impose upon the enjoyment thereof any reasonable regulation the public welfare may require. (p. 165.)

**CONSTITUTIONAL LAW—Regulation of Plumbers.**—The state may impose any restraint and prescribe any requirement it may deem proper for the protection of the public against the evils resulting from the incapacity and ignorance of persons engaged in the plumbing business, as master plumbers, employers of plumbers, or journeymen plumbers. (p. 166.)

**CONSTITUTIONAL LAW—Classification by Population.**—A classification of cities, towns and villages by population, as a basis of legislation, may be properly made if based upon a rational difference of situation or condition found in the municipalities placed in the different classes. (p. 169.)

**CONSTITUTIONAL LAW—Regulation of Plumbers—Classification by Population.**—A statute providing that all plumbers in cities, towns and villages of five thousand inhabitants or more shall obtain certificates, and requiring cities, towns and villages of ten thousand inhabitants or more to appoint and maintain a board of examiners to inquire into the qualifications of plumbers and to issue certificates thereto, is not unconstitutional as to the classification of such cities, towns and villages by population. (p. 169.)

**CONSTITUTIONAL LAW—General Laws.**—A law is general uniform if it operates alike upon every person in the state who is brought within the conditions and circumstances prescribed by the law. (p. 170.)

**CONSTITUTIONAL LAW—Regulation of Plumbers.**—A statute providing that plumbers in cities of five thousand inhabitants or more shall obtain qualification certificates, and requiring cities of five thousand inhabitants or more to appoint and maintain a board of examiners to inquire into the qualifications of plumbers and issue certificates thereto when qualified, is a valid exercise of the state police power, is valid as a general law, and does not confer arbitrary powers upon such board of examiners. (p. 171.)

J. M. Mangan, city attorney, for the appellants.

J. R. Reid, state's attorney, and E. B. Quackenbush, for the appellee.

**ST. HAND, J.** This was a petition filed in the circuit court of Kane county in the name of the people, upon the petition of J. J. Ruddy, a resident and taxpayer of the city of Aurora, in said county, against the mayor and aldermen of said city, for a writ of mandamus commanding the mayor to appoint, and the aldermen to confirm the appointment of, the second and third members of a board of examiners of plumbers, in accordance with the provisions of section 3 of an act of the General Assembly of the state of Illinois entitled "An act to provide for the licensing of plumbers and to supervise and inspect plumbing," approved June 10, 1897, in force July 1, 1897: Hurd's Stats. 1905, p. 403. It was averred in the petition said mayor had refused to appoint said second and <sup>538</sup> third members of said board of examiners and that the city council would refuse to confirm their appointment, and that the city of Aurora was organized under the general law for the incorporation of cities and villages, and that it had a population of more than ten thousand inhabitants. A demurrer was filed to said petition by the respondents on the ground that said act of the General Assembly was in violation of section 1 of article 2 and section 22 of article 4 of the constitution of the state of Illinois, and section 1 of the fourteenth amendment to the constitution of the United States, and therefore unconstitutional and void. The demurrer was overruled, and the respondents having elected to stand by their demurrer and resting to answer over, a judgment was rendered against them in accordance with the prayer of said petition, and

they have prosecuted an appeal to this court to review a judgment.

Section 1 of said act provides that any person now hereafter engaging in or working at the business of plumbing, in cities, towns or villages of five thousand inhabitants or more, in this state, either as a master plumber or employing plumber or as a journeyman plumber, shall first receive a certificate in accordance with the provisions of said act.

Section 2 provides that any person desiring to engage in or work at the business of plumbing, either as a master plumber or employing plumber or as a journeyman plumber, shall make application to a board of examiners therein provided for, and shall, at such time and place as said board may designate, be compelled to pass such examination as to his qualifications as said board may direct. Said examination may be made in whole or in part in writing, and shall be of a practical and elementary character, but sufficient in strict to test the qualifications of the applicant.

Section 3 provides that there shall be, in every city, town or village of ten thousand inhabitants or more, a board of examiners of plumbers, consisting of three members, one of whom shall be the chairman of the board of health, and shall <sup>539</sup> be chairman of said board of examiners; the second member shall be a master plumber, and the third member shall be a journeyman plumber. Said second and third members of said board shall be appointed within three months after the passage of said act by the mayor and said appointment confirmed by the city council or trustees of said city, town or village, and shall hold such appointment for a period of one year from the first day of May in the year of their appointment, and said second and third members shall be appointed annually thereafter, before the first day of May, which members shall be paid from the treasury of said city, town or village in the same manner as other officers, in such sums as the city, town or village authorities may designate.

Section 4 provides that said board of examiners shall, as soon as may be after their appointment, meet, and designate the times and places for the examination of all applicants desiring to engage in or work at the business of plumbing within their respective jurisdictions; and said board shall examine said applicants as to their practical knowledge of plumbing, house drainage, and plumbing ventilation, and



qualified of the competency of the applicant shall thereupon issue a certificate to such applicant authorizing him to engage in or work at the business of plumbing, whether as master plumber or employing plumber or as a journeyman plumber, the fee for a certificate for a master plumber or employing plumber to be five dollars and for a journeyman plumber one dollar; said certificate to be valid and have force throughout the state, and all fees received for certificates to be paid into the treasury of the city, town or village where said certificates are issued.

Section 5 provides that each city, town or village in this state having a system of water supply or sewerage shall, by ordinance or by-laws, within three months after the passage of said act, provide rules and regulations for the materials, construction, alteration and inspection of all plumbing and sewerage placed in or in connection with any building in such city, town or village, and the board of health or proper authorities shall further provide that no plumbing work shall be done, except in case of repairing leaks, without a permit being first issued therefor, upon such terms and conditions as such city, town or village shall prescribe. Section 6 provides that each person who is required to take an examination and procure a certificate, as required by said act, shall apply to the board in the city where he resides to the board nearest his place of residence.

Section 7 provides that any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and be subject to a fine of not less than five dollars, nor exceeding fifty dollars, for each and every violation thereof, and his certificate may be revoked by the board of health or the proper authorities of said city, town or village.

Section 8 provides that all acts and parts of acts inconsistent with said act are repealed.

It is first contended that the act hereinbefore referred to is in conflict with those provisions of the constitution of this state and of the United States which provide that no person shall be deprived of life, liberty or property without due process of law. The right of the citizen to follow any legitimate business, occupation, or calling, which he may see fit to engage in, and to use such right as a means of livelihood, is fully recognized in the constitutions of this state and of the United States: *Gillespie v. People*, 188 Ill. 176, 80 Am.

St. Rep. 176, 58 N. E. 1007, 52 L. R. A. 283; *Bessette v. State*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558. Such regulation, however, is subject to the paramount right of the state to impose upon the enjoyment thereof any reasonable regulation in proportion to the public welfare may acquire, and the courts have frequently held that the legislatures of the several states may impose any restraint and prescribe any requirements which they may deem proper for the protection of the public against the evils resulting from the incapacity and ignorance of persons engaged in the plumbing business, as manifested in *Singer v. State*, 72 Md. 464, 19 Atl. 1044, 8 <sup>541</sup> L. R. A. 541; *People v. Warden of the City Prison*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; *State v. Gardner*, 58 Ohio St. 599, 15 L. R. A. 689.

In the *Singer* case, the supreme court of Maryland said: "We all know that in a large city like Baltimore, with its excessive system of drainage and sewerage, the public health largely depends upon the proper and efficient manner in which the plumbing work is executed. And this being so, the legislature not only has the power, but it is evidently wise and proper that it should provide some mode by which the qualifications of persons engaged in that business shall be determined."

In *People v. Warden of the City Prison*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718, the court of appeals of New York was considering the constitutionality of an act providing for the licensing of employing plumbers, and the court said: "We know that important plumbing work calls for plans and designs and requires skilled supervision. In order that some guaranty of these requirements being met that the plumber employed upon the particular work, and who manages and employ plumbers and assistants in carrying out the work engaged upon, is competently certified and therefore held out to be skilled and capable in his business. The layman in his ignorance, is obliged to put some trust in the plumber he engages, for the plumber's work is not only one calling for the exercise of skill, but it is done in places which are dark or more or less inaccessible. The legislature in creating a system by which the qualifications of plumbers who propose to have work performed by others under their direction shall be determined, as it seems to me, aids the citizen, in an important degree, in placing his confidence and furnishing

the safeguard against the performance of bad and unsafe work. That the men employed by the master plumber may be untrustworthy in practice or may neglect the work committed to them certainly can furnish no ground for attacking the purpose of the statute, for the presumption and the natural probability are the other way—that a master plumber who has been certified by the <sup>542</sup> board will exercise care in the selection of his employes, and he will be competent to see and correct their faults and omissions. Every reason, in my opinion, which bears upon the citizen's comfort and health demands that we sustain this statute as a step in the right direction."

And in *State v. Gardner*, 58 Ohio St. 599, 65 Am. St. Rep. 5, 51 N. E. 136, 41 L. R. A. 689, the supreme court of Ohio, considering the right of the legislature to regulate the business of plumbing and provide for the licensing of plumbers, said: "True it is that the business of the plumber is ranked with the learned professions, and that much of his work is mechanical, merely, calling for exercise of dexterity of the hands rather than the possession of scientific knowledge. Yet a certain degree of training and experience is absolutely necessary to render one intelligent as to the soundwork of his calling as well as competent and skillful in its exercise. He is required to put into our dwellings and public buildings tanks, pipes, traps, fittings and fixtures for the conveyance of gas, water and sewage, which require, among other essentials, the keeping out and protection against gases which are destructive of health and not infrequently of life itself. That it is of the highest importance that the drainage and sewerage of our public buildings and private tenements should be as skillfully planned and executed as the modern standard of science admits would seem not to be open to question. And surely it is reasonable to suppose that one who has been educated to understand the scientific principle necessarily involved in work of this character and to comprehend the reasons and teachings of experience upon which it is based, and the evil results which may follow neglect to observe it, will be more likely to provide the needful safeguards than one who is ignorant upon the subject. It is conceded by those who doubt the power as well as the propriety of regulation of the work itself, that the legislature has power to provide for careful sanitary inspection of plumbing work, and in this

way secure a result, as to its system and sufficiency, which will tend toward the protection <sup>543</sup> of the health of the general public. But it is difficult to perceive a reason for the exercise of the power last referred to which does not as well apply to the other, for if it be wise to devise means by which a good result may be obtained by careful inspection, it would seem clear that methods which are calculated to reduce the hazards of careless inspection would tend in the same direction; and defects revealed by inspection would, it would seem, be more likely to be remedied, if the hands which should be called upon to do the work of correction were guided by minds trained in the science of the business as well as skilled in the mere manipulation of the tools. The question really is, Does the requirement of examination as to fitness reasonably tend to accomplish the object—is it appropriate to that end? Not, necessarily, Does it accomplish it? nor, Does it make further care in the same direction necessary? We think it does so tend and is appropriate to the purpose, and that, therefore, the act does not unreasonably interfere with the right to labor. It is not here contended that the same high qualifications as to scientific requirement should be required of the journeyman—whose principal work is manual—as is required of a master plumber—the one who makes the plans and specifications for the work, and passes judgment upon the strength, durability and quality of the material and the devices for perfect work; nor does that seem to be the import of the act, especially when it is noted that the fee for license charged is in the one case one dollar and in the other five dollars. If the examination be sufficiently searching to show that a journeyman understands the principles governing his trade and is sufficiently skillful to be able to produce good results that would seem to satisfy the scope of this act."

It is generally held that the legislature of a state may pass laws for the protection of health, comfort, safety and welfare of society, and in view of the right to exercise that general power, and the holdings of the courts in the cases from which the citations hereinbefore set out are made, we think it clear the subject matter covered by the statute whose constitutionality is here assailed was properly incorporated into law by the legislature under an exercise of the police power of the state.

is next contended that the classification by said statute of the different cities, towns and villages of the state into three classes—namely, those having less than five thousand inhabitants, those of five thousand inhabitants or more and those of ten thousand inhabitants or more—is an arbitrary classification, and that by reason of that fact said act is special and class legislation, and void. The general rule is, that classification of the cities, towns and villages of the state for population, as a basis for legislation, may be made if the classification is based upon a rational difference of situation or condition found in the municipalities placed in the different classes, otherwise legislation based upon such classification will not be sustained: *People v. Knopf*, 183 Ill. 56 N. E. 155; *L'Hote v. Village of Milford*, 212 Ill. 103 Am. St. Rep. 234, 72 N. E. 399. The statute under consideration does not apply to cities, towns or villages whose inhabitants number less than five thousand, but does require master plumbers, employing plumbers, and journey-plumbers who engage in or work at the business of plumbing in cities, towns or villages of five thousand or more inhabitants to pass an examination and obtain a certificate, in accordance with the provisions of the act, before engaging in business or in work; and in cities, towns or villages of less than ten thousand inhabitants no board of examiners is required to be appointed and maintained, while in cities, towns or villages of ten thousand inhabitants or more such boards are required to be appointed and maintained. We think it clear that there is a rational difference in the situation or circumstances, so far as the plumbing business and the appointment of a board of examiners of plumbers are concerned, between a city, town or village of less than five thousand inhabitants and a city, town or village of five thousand inhabitants or more, and between a city, town or village of less than ten thousand inhabitants and a city, town or village of ten thousand inhabitants or more; and, as a city, town or village of less population than five thousand usually does not have a complicated system of sewers and is often without a system of water supply, and has but little use for a complicated system of plumbing in its buildings or otherwise, while in a city, town or village of five thousand inhabitants or more a system of water supply and sewerage is likely to be established and a complicated sys-

tem of plumbing made necessary, and the workmen who to perform the work of supplying the plumbing to connect with said complicated system of water supply and system of sewers must necessarily have more experience and knowledge than it would be necessary to possess to install plumbing in a house in a small city, town or village; while the maintaining of an examining board might be burdensome and unnecessary in a city, town or village with inhabitants number less than ten thousand, in a city, town or village of that number of inhabitants or more such an examining board would be necessary and the expense of maintaining the board not burdensome.

It is also urged that the act is not general in terms and does not apply to all persons in the state alike, and for this reason, it is said, it is class or special legislation. The act does apply uniformly to the persons engaged in or working at the business of plumbing as master plumbers, employing plumbers or journeymen plumbers in the several cities of cities, towns, and villages created by the act throughout the state, and we think, therefore, it is not subject to criticism of want of uniformity in its application. A law is said to be general and uniform, not because it operates upon every person in the state, but because it operates alike upon every person in the state who is brought within the conditions and circumstances prescribed by the law. In *People v. Board of Supervisors*, 223 Ill. 187, 79 N. E. 100. In *People v. Hazelwood*, 116 Ill. 319, 6 N. E. 480, it was said: "Laws are general and uniform, and hence not objectionable to the objection that they are local or special, when they are general and uniform in their operation upon all persons in like situation."

It is also urged that arbitrary powers are conferred upon the statute upon the board of examiners provided for by said act. We cannot discover wherein such can be said to be arbitrary. The act provides that the board, when created, shall soon as may be shall meet, and designate a time and place for the examination of all applicants desiring to engage in the work at the business of plumbing within their jurisdiction. The examination, it is provided, may be oral or in whole or in part in writing, and is to be conducted with a view to test the practical knowledge of plumbing, house drainage and plumbing ventilation of the applicant, and if, upon such examination, the examining board shall be satisfied of

competency of the applicant, they shall issue to him a certificate authorizing him to engage in or work at the business of plumbing as a master plumber or employing plumber or a journeyman plumber, as the case may be. While the act may not be perfect in all its details, we think it a step in the right direction, and that it is not unconstitutional.

In the case of *Wilkie v. City of Chicago*, 188 Ill. 444, 182 Am. St. Rep. 182, 58 N. E. 1004, the consideration of the effect of the act whose constitutionality is now challenged is before this court, and while its constitutionality was then called in question, it was recognized as a valid enactment, and was held to work a repeal of the city and village act in so far as that act authorized cities to license plumbers. Had it then been thought the act was unconstitutional a different conclusion from that reached by the court must have been arrived at in that case.

From a careful examination of this record we are of the opinion that the act of June 10, 1897, providing for the licensing of plumbers and inspection of plumbing, is a valid act, and that under the third section thereof it was the duty of the mayor of said city to appoint two members of the board of examiners of plumbers and of the aldermen to confirm their appointment, unless grounds appeared against such confirmation other than that the act under which they were appointed was unconstitutional and void.

The judgment of the circuit court will therefore be affirmed.

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*Statute Providing that no Person shall engage in the business of plumbing unless he shall have passed an examination as to his competency and qualifications, and procured a license, and providing penalty for its violation, does not infringe in any sense the constitutional rights of the workman, and is but an ordinary exercise of the police power of the state:* *State v. Gardner*, 58 Ohio St. 65, 65 Am. St. Rep. 785. See, however, *In re Aubrey*, 36 Wash. 308, 100 Am. St. Rep. 952. But the legislature cannot prevent an association of persons in a partnership from carrying on the plumbing business because some of the partners, who have nothing to do with plumbing work or its supervision, are not registered as plumbers: *Maier v. Navarre Hotel etc. Co.*, 182 N. Y. 83, 108 Am. St. Rep. 790. See, too, *State v. Brown*, 37 Wash. 97, 107 Am. St. Rep. 798.

## GODAIR v. HAM NATIONAL BANK

[225 Ill. 572, 80 N. E. 407.]

**APPEAL—Review of Evidence.**—The question of law whether the evidence tended to support plaintiff's cause of action is preserved for review on appeal, unless at the close of the evidence in the trial court an instruction was offered to find for the plaintiff. (p. 173.)

**EVIDENCE.**—Telephone Conversations between a bank cashier and some one in the business office of a commission house about a business matter, and as to whether certain drafts would be paid together with a reply in the affirmative, are admissible, although the cashier does not know with whom he was talking. (p. 174.)

**EVIDENCE.**—Telephone Conversations about a business matter are admissible in evidence although the voice at the other end was not identified. (p. 174.)

**TRIAL—Instructions.**—An instruction which, after defining the methods of impeaching a witness, proceeds by stating that the jury believe that any witness for the defense has been successfully impeached by either of the methods aforesaid, then you are at liberty to disregard the evidence of such witness, except so far as it may be corroborated, is erroneous, and leading in singling out a witness for the defense. (p. 175.)

**WITNESSES—Impeachment.**—A witness cannot be discredited simply on the ground of an erroneous statement. It is only where his statements are willfully and corruptly false in regard to material facts that his entire testimony may be discredited. (p. 176.)

**WITNESSES—Impeachment.**—A witness who is contradicted upon a material matter by other witnesses, or who has made a contradictory statement out of court upon a material matter, is not necessarily impeached as to his entire testimony, unless his testimony as to such material matter was knowingly and willfully corruptly false. (p. 177.)

Jones, Jones & Hocker and W. H. Green, for the appellants.

H. C. Horner and A. Watson, for the appellee.

**573 HAND, J.** This was an action of assumpsit commenced by appellee, the Ham National Bank of Mt. Vernon, against W. H. Godair, A. G. Godair, and E. C. Gibson, doing business as the Godair Commission Company, and Samuel M. Moreland, in the circuit court of Jefferson county, to recover the amount of two drafts for the sum of five hundred dollars each, and interest, drawn, respectively, on November 4 and November 6, 1903, by Samuel L. Moreland, through appellee bank, upon the Godair Commission Company and paid upon the checks of Samuel L. Moreland by the appellee bank, which drafts were allowed to go to protest by said Godair



Commission Company for nonpayment. The declaration was in the usual form, and the general issue was filed, and a trial resulted in a verdict and judgment in favor of the appellee for the sum of one thousand and seventy-six dollars and seventy cents, which judgment was affirmed by the appellate court for the fourth district, and an appeal has been prosecuted to this court by the Godair Commission Company.

It is first contended by the appellants that the evidence does not support the plaintiff's cause of action. This court does not weigh the evidence, and the question sought to be decided by the appellants can only arise as a question of law in this court; and it has been repeatedly held by this court that the only manner in which the question of whether the evidence fairly tends to support the plaintiff's cause of action or the defendant's defense can be preserved for review as a question of law in this court is by an instruction, offered at the close of all the evidence, to find for the plaintiff or defendant: *Pittsburg etc. Ry. Co. v. Hewitt*, 202 Ill. 28, 66 N. E. 829; *Chicago Union Traction Co. v. O'Donoghue*, 211 Ill. 349, 71 N. E. 1015; *Streator Independent Telephone Co. v. Continental Telephone Construction Co.*, 217 Ill. 577, 75 N. E. 546. As no such instruction was offered in this case, the question of law whether the evidence tended to support the plaintiff's cause of action is not preserved for review upon this record and cannot be considered in this court.

It is next contended by the appellants that the court erred in its ruling upon the admission of evidence. Samuel L. Moreland was a stock buyer and shipper in Jefferson county, and he testified that some time prior to the drawing of said drafts he entered into an arrangement with the Godair Commission Company, doing business at East St. Louis, by which it was agreed he was to purchase and ship livestock to said commission company, and that said commission company was to pay drafts drawn by him upon said company with which to obtain funds to pay for said livestock; that he communicated said arrangement to the appellee and that it was agreed to cash said drafts. Mr. Pavey, the cashier of the appellee bank, testified that Moreland had drawn numerous drafts upon the appellee bank upon said commission company in virtue of the arrangement testified to by Moreland, prior to the time he drew the drafts in question, which had been approved by the commission company. Mr. Grant, a former

cashier of the bank, testified that on an occasion prior to drawing of the drafts in question, and while he was acting as cashier for the bank, Moreland desired said bank to cash certain drafts drawn by him upon said commission company for a considerable amount; that before cashing the same he called up the office of the Godair Commission Company, East St. Louis, by telephone, and asked for Mr. Godair, that someone in the office answered that Mr. Godair was <sup>575</sup> in; that subsequently the commission company called up the bank and said the party wanted by the bank was in; that he thereupon talked with some one connected with the Godair Commission Company; that he inquired if drafts of Moreland would be paid, as he wished to draw through the bank upon the Godair Commission Company a sufficient amount to pay for two or three carloads of catfish; that the party with whom he talked said the drafts would be paid; that he did not know Mr. Godair, and did not recognize his voice, and could not say with whom he talked at the office of the Godair Commission Company. The testimony of Mr. Grant was objected to as incompetent. The objection was overruled and the testimony was admitted, and its admission is now urged as reversible error.

In the case of *Wolfe v. Missouri Pacific R. Co.*, 97 Mo. 410, 10 Am. St. Rep. 431, 11 S. W. 49, 3 L. R. A. 539, substantially the same question presented here was passed upon by the supreme court of Missouri. It was there sought to introduce a conversation had by telephone between a witness and some person in the business place of one of the parties to the suit. The evidence was held admissible. The court said: "When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible." While the weight to be given to such a conversation is to be determined by the jury, we think the reasoning of the court in the *Wolfe* case satisfactory, and are of the opinion the court did not err in admitting the evidence.

It is next urged that the court committed reversible error in giving to the jury plaintiff's fifth instruction, which reads as follows: <sup>576</sup> "A witness may be impeached by the contradictory testimony of other credible witnesses upon material matters or by proof that he has made statements on material questions out of court contrary to his testimony here, and when so impeached all of his evidence may be disregarded by the jury except where corroborated by other credible evidence; and if the jury believe that any witness for the defense has been impeached by either of the methods aforesaid, then you are at liberty to disregard the evidence of such witness, except so far, if at all, as he may have been corroborated by other credible evidence in the case."

Two criticisms are made upon this instruction: First, that it singles out the witnesses of the defendant and particularly calls the attention of the jury to the testimony of such witnesses; and secondly, that it informed the jury that they may disregard the testimony of a witness, except in so far as he has been corroborated by other credible evidence, if his testimony upon a material matter has been contradicted by the testimony of other witnesses, or if he has made statements out of court upon material matters different from his testimony in court, without requiring the jury to believe that the witness has knowingly and willfully testified falsely with reference to such material matters. The testimony upon many material points was conflicting, and the jury should have been accurately instructed. The court, by the instruction, first pointed out two methods of impeachment, and then told the jury that if they believed that "any witness for the defense has been impeached by either of the methods" referred to, they were at liberty to disregard the evidence of such a witness, except in so far as the witness may have been corroborated by other credible evidence in the case. From the instruction the jury might readily have understood that the judgment of the court there was something in the testimony of some one of the witnesses for the defense which made the application of the rules of impeachment announced by the court in the first part of the instruction especially applicable <sup>577</sup> to such witnesses which did not apply to the witnesses for the plaintiff or the other witnesses in the case. It should not have been done. "A court can hardly err in

refusing to give any instruction which seems designed to influence a jury as to the credit to be given to particular witnesses": *Martin v. People*, 54 Ill. 225. As to the second criticism, it has uniformly been held by this court that the maxim, "*Falsus in uno falsus in omnibus*" should only be applied in cases where a witness has knowingly and willfully given false testimony: *Chittenden v. Evans*, 41 Ill. 251; *People of Chicago v. Smith*, 48 Ill. 107; *United States Ex. Ct. v. Hutchins*, 58 Ill. 44; *Pope v. Dobson*, 98 Ill. 360; *Gulliver v. People*, 82 Ill. 145; *Swan v. People*, 98 Ill. 610; *Hoge v. People*, 117 Ill. 35, 6 N. E. 796; *Freeman v. Easley*, 117 Ill. 7 N. E. 656; *Overtown v. Chicago etc. R. Co.*, 118 Ill. 323 N. E. 898; *Matthews v. Granger*, 196 Ill. 164, 63 N. E. 658.

In *City of Chicago v. Smith*, 48 Ill. 108, it was said: "As to the eighth instruction given by the defendant which was refused, we are of opinion, under the authority of the *People of Chicago v. Brennan*, 15 Ill. 511, it should not have been given. There the court say, it does not follow, merely because a witness makes an untrue statement, that his entire testimony is to be disregarded. This must depend upon the motive of the witness. If he intentionally swears falsely as to one matter, the jury may properly reject his whole testimony as unworthy of credit. But if he makes a false statement through mistake or misapprehension they are not to disregard his testimony altogether. The maxim '*Falsus in uno falsus in omnibus*' should only be applied in cases where a witness willfully and knowingly gives false testimony."

And in *Pope v. Dobson*, 58 Ill. 365: "The tenth instruction in the series given for appellee is palpably erroneous. It is told the jury that if the witness Lovely 'has sworn falsely in any material statement' the jury might disregard his entire statement except so far as it was corroborated." 578 A witness cannot be discredited simply on the ground of an erroneous statement. It is only where the statement and the facts a witness are willfully and corruptly false in regard to material facts that the jury are authorized to discredit his entire testimony. The most candid witness may innocently make an incorrect statement, and it would be monstrous to hold that his entire testimony, for that reason, should be disregarded." This statement was quoted with approval in *Matthews v. Granger*, 196 Ill. 172, 63 N. E. 658.

In *Gullihier v. People*, 82 Ill. 145, the court instructed the jury that if they believed that the defendant had "been contradicted on a material point," that the jury had the right to disregard his whole testimony unless corroborated by other testimony. The court said: "The instruction was clearly erroneous. When analyzed, it plainly tells the jury that 'if you believe, from the evidence, that Alfred F. Foote, has been contradicted on a material point, then the jury have the right to disregard his whole testimony, unless corroborated by other testimony.' This is not the law. . . . If the witness, whether defendant or otherwise, is shown, by proofs, to have sworn willfully and knowingly false on any material matter, his evidence may be rejected so far as it is not corroborated. . . . The mere fact, however, that he is contradicted as to some material matter is not enough to warrant the rejection of his evidence altogether."

In *Overtom v. Chicago etc. R. R. Co.*, 181 Ill. 323, 54 N. E. 898, the court instructed the jury that "if they believe a witness has testified falsely, then the jury may disregard such witness' testimony except in so far as it may have been corroborated." In disposing of this instruction the court said: "A witness may have testified falsely upon some matter inquired about, from forgetfulness or honest mistake, and in such case the jury would not be authorized to disregard his entire testimony, whether corroborated or not. It is the corrupt motive, or the giving of false testimony knowing it to be false, that authorizes a jury to disregard the testimony of a witness and the court to so instruct the jury."

We think it clear that a witness may be contradicted upon material matter by other witnesses, or may have made statements upon a material matter out of court contrary to his testimony in court, without having testified knowingly and willfully falsely. If this be admitted, then, under the foregoing authorities, plaintiff's given instruction No. 5 must be conceded to be erroneous, and as the evidence was conflicting, and as that was the only instruction upon the subject, the giving thereof was reversible error.

The judgments of the appellate and circuit courts will be reversed and the cause remanded to the circuit court for a new trial.

*A Conversation Over a Telephone is Admissible in Evidence:* *Y v Seattle Transfer Co.*, 33 Wash. 225, 99 Am. St. Rep. 942; *Shaw v. Chamberlain*, 113 Iowa, 742, 86 Am. St. Rep. 411, and cases cited in the cross-reference note thereto. And this is true, it has been held, although the voice at the telephone is not identified: *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331. See, however, the Washington case above cited.

# CASES

## IN THE

# SUPREME COURT

### OF

## LOUISIANA.

### METROPOLITAN LIFE INSURANCE COMPANY v. BOARD OF ASSESSORS.

[115 La. 698, 39 South. 846.]

**TAXATION—Situs of Personalty.**—The rule “*mobilia sequuntur personam*” is a fiction of law not resting of itself upon any constitutional foundation, and it gives way before express law destroying it in any given case, where constitutional requirements do not stand in the way. (p. 187.)

**CORPORATIONS, FOREIGN—Conditions Precedent to Doing Business within the State.**—A state has the right in consenting to allow foreign corporations to carry on business within her borders to attach any kind of conditions to such consent. (p. 188.)

**CORPORATIONS, FOREIGN—Taxation.**—A state may tax a foreign insurance corporation to any extent or in any manner it may deem proper, as a condition precedent to its doing business within the state. (p. 189.)

**CORPORATIONS, FOREIGN—Compliance with State Laws.**—A foreign corporation coming into the state for business purposes is constructively present therein, and voluntarily places itself within the jurisdiction of the state, and accepts and subjects itself to the laws of the state. (p. 189.)

**CORPORATIONS, FOREIGN—Taxation of.**—Investments made by a foreign corporation within the state are subject to taxation under its laws when made by a resident agent of the corporation employed for that purpose, and at whose office within the state, loans are made payable, and to whom the notes taken for loans are returned for collection. (p. 189.)

**CONSTITUTIONAL LAW—Taxation of Foreign Corporations.**—A statute providing for the state taxation of credits arising out of loans made in the regular course of business therein by the local agent of a foreign insurance corporation to its policy-holders is constitutional and valid, where the loans are negotiated, the notes signed, the security taken and the interest and loans collected within the state, although the notes which are evidence of the loans and credits are kept at the home office of the corporation at all times when not collected in the state. (p. 190.)

F. C. Zacharie, H. G. Dupre, assistant city attorney,  
G. H. Terriberry, for the appellant.

Howe, Spencer & Cocke, for the appellee.

J. Z. Spearing, amicus curiae.

699 NICHOLLS, J. The plaintiffs, a corporation created and existing under the laws of the state of New York, appearing in the suit through its duly authorized agent in the state of New Orleans, alleged:

That it is a corporation engaged in the business of insurance in various portions of the United States, and its domicile is in the city of New York, where its general or home offices are situated and its officials reside. That it has an office in the city of New Orleans, where it is represented by subordinate managers only. That, in accordance with its charter, in the month of January, 700 1904, to wit, on or about the twenty-first day of January, 1904, it duly filed with the board of assessors for the parish of Orleans its sworn statement of all the property owned by it subject to taxation under the laws of this state. That, notwithstanding the fact that petitioner had made a true return of its taxable property to said board of assessors, said board did, nevertheless, proceed to and did assess petitioner upon property not owned or controlled by it, or any of its officers, in the state of Louisiana, and said board, despite the due and seasonable protest of petitioner, made an erroneous, illegal, and void assessment on the following, to wit, \$10,000 credit, money loaned, etc., \$10,000 money in possession, etc. Petitioner averred that it did not have any time during the current year, on hand or on deposit within the state of Louisiana, funds exceeding the sum of \$1,500 as set forth in their sworn return. That the assessment in the sum of \$10,000, made by said board on account of credits, money loaned, etc., was illegal, null, and void, for the reason that any credits, bills receivable, or moneys loaned by and due to petitioner are not located and payable in this state, but are located and payable and taxable only at the domicile of petitioner, and are not subject, under the constitution of the United States and the laws of this state, to taxation by the state of Louisiana, and that said assessment by the board of assessors was an attempt to extend the taxing privilege of the state of Louisiana beyond the territorial jurisdiction



proof, and constituted a taking of property without due process of law, in violation of the fourteenth article of amendment of the constitution of the United States, which this petitioner expressly pleaded and claimed the benefit of.

That in accordance with the statutes made and provided petitioner duly and seasonably applied to said board of assessors and to the revision committee of the city council for <sup>701</sup> cancellation of said illegal assessment, and for the reduction of said assessment of money on hand to the amount returned under oath by this petitioner to the board of assessors. That the said board of assessors, upon application, reduced the said amount of \$10,000, assessed to petitioner money in possession, to the sum of \$7,500, instead of to \$10,500, as prayed, but persisted in assessing petitioner with the sum of \$10,000 for credits, bills receivable, etc.

That petitioner thereupon made a legal tender of the sum of \$46 to the treasurer of the city of New Orleans, being in full of the amount of taxes legally due by it for the current year, which tender was refused. That it had been notified by the said treasurer and by John Fitzpatrick, state tax collector for the first district, to pay the taxes based upon said illegal assessment, and that they would impose penalties and seize the property of petitioner unless enjoined and restrained by this honorable court. In view of the premises, petitioner prayed that the city of New Orleans, through its proper officer, the board of assessors, through its proper officer, and John Fitzpatrick, the state collector for the first district, be lawfully cited to appear and answer hereto, and that, after due proceedings had, there be judgment in favor of petitioner and against said defendants, decreeing that the assessment against petitioner in the sum of \$10,000, on account of credits, money loaned, etc., be declared to be null and void, and that the assessment against petitioner, on account of moneys in hand, etc., be reduced to the sum of \$1,500, and that the defendants, and each of them, be restrained and prohibited from collecting or attempting to collect any taxes based upon said illegal assessment, and petitioner prayed for all costs and for general relief.

The board of assessors and state tax collector filed an answer in which they pleaded <sup>702</sup> the general issue, and prayed that plaintiffs' demand be dismissed. They prayed that they receive judgment for ten per cent attorneys' fees on the aggre-

gate amount of the taxes and penalties involved in the case until paid, or so much thereof as might be named for the court and for all and general relief.

The city of New Orleans pleaded the general issue, and prayed that plaintiff's demand be dismissed, and that there be judgment in its own favor.

The district court declared that the law and the evidence were in favor of the plaintiff and against the defendants, and for the reasons assigned in open court in the written opinion it rendered judgment in favor of plaintiff.

The judgment adjudged and decreed that there be judgment in favor of plaintiff, the Metropolitan Life Insurance Company of New York, and against the defendants, the city of New Orleans, the board of assessors for the parish of Orleans, and John Fitzpatrick, state tax collector for the first district of New Orleans, decreeing and ordering that the assessment for the year 1904, against the plaintiff company's moneys in hand, etc., be reduced to the sum of \$4,000, and further decreeing the assessment for said year against said company in the sum of \$10,000 on account of credits, money loaned, etc., to be null and void.

It further ordered that said defendants, and each of them, be, and they are hereby, restrained and prohibited from collecting or attempting to collect any taxes based upon said illegal assessment, and that defendants pay all costs of this suit.

The written reasons were as follows:

This is an action for reduction of assessment on money in possession, on deposit, etc., and for the cancellation of assessment upon credits, money loaned, bills receivable, etc.

703 The evidence shows, and it was admitted at the trial by all counsel, that the average of money in possession and on deposit by plaintiff does not exceed \$4,000, and that it ought therefore to be reduced accordingly.

The evidence also shows, and it is not disputed, that only "credits, money loaned, and bills receivable" belonging to plaintiff, and intended to be taxed, consist of loans made to their policy-holders in this state, and evidenced by their notes secured by pledge of its own policies, all of which, as soon as executed, are transmitted to the home office in the city of New York, and are returned to this city only for purposes of collection or renewal.

the authority under which it is proposed to assess and these notes is the seventh section of Act No. 170 of 1898, the last clause whereof reads as follows: "And all bills receivable, obligations or credits arising from business done in this state are hereby declared assessable within this state at the business domicile of said nonresident, his agent or representative."

This section is identical in terms with the corresponding section of Act No. 106 of 1890, a statute which stood unrevoked when the supreme court of this state declared, substantially, in *Liverpool etc. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 11 South. 91, 16 L. R. A. 56, that "no legislative power existed to change the situs of debts due to nonresidents," unless such debts had assumed some "concrete form" in the evidence thereof, and "such evidences are situated in the state," language tantamount to a declaration that this provision of the statute was repugnant to some other law; i. e., was "unconstitutional." Under this high authority, then, I am constrained to declare that so much of the seventh section of Act No. 170 of 1898 as attempts to make assessable in this state any bills receivable due to nonresidents, unless the same are "situated in the state," is unconstitutional, and therefore void, and any <sup>704</sup> assessment made in pursuance thereof is therefore null.

The defendants appealed.

In the brief on behalf of the insurance company the statement is made that on the trial defendant's counsel made such admissions as reduced this cause to the sole question of the validity and unconstitutionality of the attempted tax on credit-money loaned, etc.

The plaintiff is a corporation under the laws of New York. It had duly complied with the statutes of the state regulating the entry and doing of business by foreign insurance companies, and has and maintains an office in the city of New Orleans. Following the usual notice on January 21, 1904, it filed its sworn return of property owned by and subject to taxation in this state. The board of assessors proceeded to alter this section in two particulars. It assessed to the plaintiff the sum of \$10,000 as money in possession or on deposit and \$10,000 as credits, moneys loaned, and bills receivable.

"On the 1st of January, 1904, the plaintiff had outstanding loans made to residents in Louisiana amounting to about \$10,000. Between the 1st of January and the 1st of April, 1904, the plaintiff loaned to persons in Louisiana the sum of \$1,492.

"The method of making these loans was that described by Mr. McHardy, the resident superintendent:

"Q. I want you to describe to the court the method by which a loan is applied for to the company and passed on to the company, and how the contract is accepted. A. The policy-holder applies to me for a loan on his policy. I take the application, and I advise the company and procure the necessary note.

"Q. Where do you procure that note from? A. From the home office at New York.

"Q. Who passes on the application? A. The home office.

"Q. In case they decide to accept the loan, they advise you? A. Yes.

"Q. Then what do you do? A. I take the policy, with the note, and send it to the home office, and, if they pass upon it approvingly, the check is sent to me personally.

"Q. Where were the notes and the policy securing the notes representing this \$10,000 on the first day of January, 1904? In other words, where were they located? A. In New York, sir.

"Q. Are those notes always located in New York? A. Yes, sir.

705 "Q. That is to say, they are sent by you to New York when? A. Immediately upon the loan being completed.

"Q. Do you in any case retain for more than twenty-four or forty-nine hours the evidence of indebtedness in your office? A. No, sir.

"Q. In other words, within twenty-four or forty-eight hours the notes and policies go to the home office in the course of business? A. Yes sir."

In the syllabus to the brief of the appellant the following, among other propositions, are laid down:

"1. The doctrine of '*Mobilia sequuntur personam*' is subject to so many exceptions that it can be applied only in the simplest cases: *Story on Conflict of Laws*, 2d ed., p. 414, § 334; *New Orleans v. Stemple*, 175 U. S. 309, 20 Sup. Ct. Rep. 110, 44 L. ed. 174; *Bristol v. Washington County*, 1

S. 133, 20 Sup. Ct. Rep. 585, 44 L. ed. 701; Blackstone Miller, 188 U. S. 189, 23 Sup. Ct. Rep. 277, 47 L. ed. 439.

'2. It can never prevail in the face of positive law to the contrary: Norris v. Mumford, 4 Mart. (O. S.) 20; Ramsey v. Evenson, 5 Mart. (O. S.) 23, 12 Am. Dec. 468; Fisk v. Chandler, 7 Mart. (O. S.) 24; Beirne v. Patton, 17 La. Ann. 9; United States v. Bank of United States, 8 Rob. 262; Put v. Acheverra, 24 La. Ann. 93; Succession of Caballero, La. Ann. 573; Freret v. Freret's Heirs, 31 La. Ann. 506. Especially when there is a positive tax law to the contrary: State v. Martin, 2 La. Ann. 667; State v. Poydras' Heirs, 9 La. Ann. 165; Succession of Dufour, 10 La. Ann. 391; Succession of Prevost, 12 La. Ann. 577. The decisions in Meyer Pleasant, 41 La. Ann. 645, 6 South. 258, Barber Asphalt v. City of New Orleans, 41 La. Ann. 1015, 6 South. 794, do not controvert that principle, because under the tax acts of 1886 and 1888 there were no provisions in conflict with the doctrine of '*Mobilia sequuntur personam*.'

'3. The jurisprudence of the courts of other states establish this as one of the exceptions to the maxim: Alvany v. Sewell, 55 N. C. 51; Catlin v. Hull, 21 Vt. 152; Smith v. Hurley, 9 N. H. 423; State v. St. Louis County Court, 47 Mo. 594; People v. Home Ins. Co., 29 Cal. 533; City of St. Louis v. Wiggins Ferry Co., 40 Mo. 580; Wilcox v. Ellis, 14 Mo. 588, 19 Am. Rep. 107; Board of Supervisors of Tazewell County v. Davenport, 40 Ill. 197; Douglas v. Mayor etc. City of New York, 2 Duer, 110; Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307. And it has also been maintained in State v. Board of Assessors, 47 La. Ann. 1544, 18 South. 9; Bluefields Banana Co. v. Board of Assessors, 49 La. Ann. 43, 21 South. 627; Parker v. Strauss, 49 La. Ann. 1173, 21 South. 329. The decision in Railey v. Board of Assessors, 49 La. Ann. 765, 11 South. 93, is not sustained by the authorities cited therein.

706 "Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189, and United States v. Erie Ry. Co., 106 U. S. 327, 23 Sup. Ct. Rep. 223, 27 L. ed. 151, in effect overrule In re Estate of Tappan, 15 Wall. 300, 21 L. ed. 189. State ex rel. Abbott v. Hicks, 44 La. Ann. 776, 11 South. 74, while seeming to oppose our contention, yet only modifies it, while Clason v. City of New Orleans, 46 La. Ann. 1, 14 South. 306, is against it.

"4. Investments by a nonresident of the state are subject to taxation under the laws of the state when made by a resident agent who is employed to invest money at whose office the loans are made payable, and to whom the notes taken for the loans are returned for collection: *Bristol v. Washington County*, 177 U. S. 133, 20 Sup. Ct. Rep. 585, 44 L. ed. 70; *New Orleans v. Stemple*, 175 U. S. 309, 20 Sup. Ct. Rep. 13, 44 L. ed. 174.

"5. Whether our contention hereinbefore set forth be correct or not, there can be no serious question that a state can tax a foreign corporation, especially a foreign insurance company, to any extent or in any manner it sees proper, for the privilege of doing business in the state: 6 *Thompson's Commentaries on Corporations*, secs. 8087, 7900, and authorities there cited; 12 *Cook on Corporations*, 4th ed., p. 1080, and authorities there cited; *Cooley on Taxation*, 387; 1 *Desty on Taxation*, 229, 372; *Burroughs on Taxation*, 151; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 19 L. ed. 1029; *Oliver v. Liverpool & London Life & Fire Ins. Co.*, 100 Mass. 531; *Attorney General v. Bay State Min. Co.*, 99 Mass. 148, 96 Am. D. 717; *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. ed. 70; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. Rep. 739, 28 L. ed. 1137; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380, 32 L. ed. 311; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 17 Sup. Ct. Rep. 403, 36 L. ed. 164; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. Rep. 305, 41 L. ed. 683; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 13, 17 Sup. Ct. Rep. 532, 41 L. ed. 953."

On the trial of the case it was admitted that the state tax collector threatened a seizure in this case and would proceed unless prevented by order of court. On cross-examination Mr. McHardy, the local superintendent, he was questioned as to how the policy-holders obtained loans and method of proceedings in respect to their application, and testified as follows:

707 "Q. To whom is application made—to you? A. Yes, sir.

'Q. What do you do after that? A. I forward the application to the home office, with the request that the loan be granted them (if I consider it all right), and that the necessary loan note be forwarded and the note is sent to me.

'Q. Where is the note executed? A. Here, as far as the signatures are concerned.

'Q. What do you do with the note? A. I take the policy, attach it to the note, with any letter necessary in the case, and forward it to the home office.

'Q. Where is the interest paid on those notes? A. Here, me.

'Q. And the interest is remitted by you? A. Yes, sir.

'Q. And when the note is liquidated, paid in full—how is it managed? A. It is invariably paid to me.

'Q. Whom is payment made to for final settlement of the note? In the same way as the interest? A. Yes, sir.

'Q. And the note is sent back to you, and by you delivered to the owner? A. Yes, sir.

'Q. How do you receive remittances to pay those borrowings? A. By check.

'Q. On what bank? A. The National Shoe & Leather Bank of New York.

'Q. How about renewals for a time when the time expires? A. The borrower has the right to take up the note when due or to pay interest.

'Q. Have you had occasion to sue, in the last few years in these courts, any of those who refused to pay you? A. No, sir."

Counsel of appellants say:

The sum and substance of the testimony is that the plaintiffs receive about \$10,000 a year on loans, which they remit to the home office, and they receive \$7,000 per week in cash as premiums.

On this showing plaintiffs contend that the tax cannot be assessed on the credits and money loaned on the principle '*Mobilia sequuntur personam*.' "

In *Bluefields Banana Co. v. Board of Assessors*, reported in *La. Ann.* 43, 21 South. 627, the rule "*Mobilia sequuntur personam*" was declared to be a fiction of the law not resting itself upon any constitutional foundation, and, which was way before express law destroying it in any given case where constitutional requirements <sup>708</sup> do not stand in the

way. Answering the claim asserted that the taxation provided for in that case could not be made effective, the court said: "Conceding that proposition true, it did not furnish a test as to its constitutionality." We see no reason to alter the views so announced. We believe they are in accord with the generally accepted judicial opinion. In *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. Rep. 277, 47 L. ed. 439, the supreme court of the United States, referring to the maxim '*Mobilia sequuntur personam*,' said that "when logic and the policy of the state conflict when a friction due to historical tradition, the friction must give way."

There can be no doubt that the seventh section of the act of 1898, quoted in the judgment of the district court, announced the policy of the state touching the taxation of credits and bills of exchange representing an amount of the property of nonresidents equivalent or corresponding to such bills or credits which was utilized by them in the prosecution of their business in the state of Louisiana. The evident object of the statute was to do away with the discrimination theretofore existing in favor of nonresidents as against residents, and place them on an equal footing. The statute was not arbitrary, but a legitimate exercise of legislative power and discretion.

It is not contested that the state has the right, in consenting to allow foreign corporations to carry on business within her borders, to attach such conditions to such consent as she pleases. These foreign corporations are under no obligation to accept the terms; but, if they do accept them and carry on business in the state, they must comply with them. They cannot avail themselves of the benefits of the consent and repudiate the obligations attached thereto. The conditions of consent may refer to the matter of taxation, as well as to anything else. When foreign corporations come into the state for <sup>709</sup> business purposes, they are constructively present in the state, and voluntarily place themselves within the jurisdiction of the state and accept and subject themselves to the laws thereof.

As was said in *Bluefields Banana Co. v. Board of Assessors*, 49 La. Ann. 43, 21 South. 627, these foreign corporations do business in Louisiana, transact their business precisely as do resident business men and corporations. They derive the advantages to be obtained from the state and city gov-



ments which residents receive, and we see no reason why they should not be taxed as claimed, unless there be insuperable legal objections in the way.

This language was approvingly quoted in *Comptoir National v. Board*, 52 La. Ann. 1319, 27 South. 801. Taxation is the correlative of protection. The evidence in the present case established the fact that the notes referred to were signed by the borrowers in the state of Louisiana and delivered there to the local superintendent of the company, who turned over to them in Louisiana the amount borrowed of the company.

As stated in the *Comptoir National* case: "The particular manner or instrumentality by which the moneys used by the company in the course of its continuing business in Louisiana was obtained was a matter of no moment or significance to the consideration of the question we are now dealing with. The company, beyond question, loaned money in Louisiana, and the moneys, for the purposes of the loan, were the company's moneys, and the borrowers gave their own notes to the company to represent the moneys received from the company. The notes represent an equivalent amount of money of the company in Louisiana."

The moment these moneys were received in Louisiana, and were delivered to the company's local superintendent, the taxing power attached against the company, and immediately after the delivery of the moneys to the borrowers the tax struck the notes delivered to the superintendent in representation of the moneys, regardless of what disposition might be made of them subsequently. It is a mistake to suppose that because the <sup>710</sup> tax debtor might, in order to evade the payment of the tax, or for any other reason, remove the notes beyond the limits of the state, the tax would be destroyed. Tax evasion would not be tolerated. It would not be necessary for the state to go beyond its limits for the enforcement of the tax against the company because the notes should have been taken outside the state. Article 233 of the constitution declares: "Taxes on movables shall be collected by seizure and sale by the tax collector of the movable property of the delinquent to pay the tax."

Sale of such property shall be made at public auction without appraisal, after ten days' advertisement made within ten days from date of seizure, and shall be absolute and without redemption. If the tax collector can find no corporeal

movables of the delinquent to seize he may levy on corporate rights by notifying the debtor thereof or he may proceed by summary rule in the courts to compel the delinquent to deliver up for sale property in his possession or under his control.

The state would have power over the person of the debtor through service on their local superintendent. In *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. Rep. 277, 47 ed. 459, the court said that power over the debtor gave jurisdiction, and that matter could be disposed of, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of the power of the state over the person of the debtor.

There was no reason for or justice in the withdrawal of the company of the notes, and the holding of them in vaults until required in Louisiana for the purpose of their payment as it is declared was done. Their value was in that manner enhanced by that fact. Their value continued to rest in the fact that the notes were secured as to payment by the property of the debtors in Louisiana, and through their right to their enforcement under Louisiana law in the courts of the state. The investment by the company was as to value due to nothing in New York, but entirely to what was done in Louisiana. It is claimed by the plaintiff that the law of Louisiana takes its property from it without due process of law, but it is not pointed out in what way that was not due process of law, and we fail to see wherein that was not. Appellant does not urge, and could not urge, that it did not obtain the equal protection of the law, for what it now seeking to preserve is the greater protection which has been accorded foreign corporations over residents of Louisiana up to the time that the statutes were changed.

We are of the opinion that the judgment appealed from is adjudging and decreeing the statute to be unconstitutional is erroneous. We hereby hold and decree the statute to be constitutional.

For the reasons assigned, it is ordered, adjudged and decreed that, in so far as the judgment appealed from decrees the assessment against the plaintiff in the sum of \$10,000 for the year 1904, on account of credits, moneys loaned, etc., be null and void, and decrees the unconstitutionality of the law upon which it is based, the same be annulled, avoided and reversed, and that, in so far as such judgment fails

ward to the defendants the attorneys' fees allowed by law, the same be amended to the extent that there now be judgment in favor of the defendants, the tax collector, and against the plaintiff, condemning the latter to pay, in addition to the tax to be recovered, ten per cent on that portion thereof with respect to which no reduction of assessment has been obtained in this proceeding.

It is further ordered, adjudged, and decreed that in all other respects the judgment appealed from be affirmed, the plaintiff to pay the costs of appeal.

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The Principal Case was Carried by Writ of Error to the supreme court of the United States and there affirmed (*Metropolitan L. I. Co. v. New York v. City of New Orleans*, 205 U. S. 395, 27 Sup. Ct. Rep. 100), in an opinion delivered by Mr. Justice Moody as follows:

'This is a writ of error to review the judgment of the supreme court of Louisiana, which sustained a tax on the 'credits, money loaned, bills receivable,' etc., of the plaintiff in error, a life insurance company incorporated under the laws of New York, where it had its home office and principal place of business. It issued policies of life insurance in the state of Louisiana, and, for the purpose of doing so, and other business, had a resident agent, called a superintendent, whose duty it was to superintend the company's business generally in the state. The agent had a local office in New Orleans. The company was engaged in the business of lending money to the holders of its policies, which, when they had reached a certain point of maturity, were regarded as furnishing adequate security for loans. The money lending was conducted in the following manner: The policy-holders desiring to obtain loans on their policies applied to the company's agent in New Orleans. If the agent thought a loan desirable one he advised the company of the application by communicating with the home office in New York, and requested that the loan be granted. If the home office approved the loan the company forwarded to the agent a check for the amount, with a note, to be signed by the borrower. The agent procured the note to be signed, attached the policy to it, and forwarded both note and policy to the home office in New York. He then delivered to the borrower the amount of the loan. When interest was due upon the notes it was paid to the agent and by him transmitted to the home office. It does not appear whether or not the notes were returned to New Orleans for the indorsement of the payments of interest. When the notes were paid it was to the agent, to whom they were sent to be delivered back to the makers. At all other times the notes and policies securing them were kept at the home office in New York. The disputed tax was not so nomine on these notes, but was expressed to be on 'credits, money loaned, bills receivable,' etc., and its amount was ascertained

by computing the sum of the face value of all the notes held by the company at the time of the assessment. The tax was assessed under a law (Act 170 of 1898) which provided for a levy of annual tax on the assessed value of all property situated within the state of Louisiana, and in § 7 provided as follows:

“That it is the duty of the tax assessors throughout the state to place upon the assessment list all property subject to taxation including merchandise or stock in trade on hand at the date of list within their respective districts or parishes. . . . And provided further, in assessing mercantile firms the true intent and purpose of this act shall be held to mean the placing of such value upon stock in trade, all cash, whether borrowed or not, money at interest, on accounts, credits, etc., as will represent in their aggregate a fair average on the capital, both cash and credits, employed in the business of the party or parties to be assessed. And this shall apply with equal force to any person or persons representing in this state business interests that may claim domicile elsewhere, the intent and purpose being that no nonresident, either by himself or through any agent, shall transact business here without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations, or credits arising from the business done in this state are hereby declared as assessable within this state and at the business domicile of said nonresident, his agent or representative.”

“The evident purpose of this law is to lay the burden of taxation equally upon those who do business within the state. It requires that in the valuation for the purposes of taxation of the property of mercantile firms the stock, goods, and credits shall be taken into account, to the end that the average capital employed in the business shall be taxed. This method of assessment is applied impartially to the citizens of the state and to the citizens of other states or countries doing business, personally or through agents, within the state of Louisiana. To accomplish this result the law expressly provides that all bills receivable, obligations, or credits arising from the business done in this state shall be assessable at the business domicile of the resident. Thus it is clear that the measure of the taxation designed by the law is the fair average of the capital employed in the business. Cash and credits and bills receivable are to be taken into account merely because they represent the capital, and are not to be omitted because their owner happens to have a domicile in another state. The law was so construed by the supreme court of Louisiana where, in sustaining the assessment, it was said:

“There can be no doubt that the seventh section of the act of 1898, quoted in the judgment of the district court, announced the policy of the state touching the taxation of credits and bills of exchange representing an amount of the property of nonresidents equivalent or corresponding to said bills or credits which was utilized by them in the prosecution of their business in the state of Louisiana.

evident object of the statute was to do away with the discrimination theretofore existing in favor of nonresidents as against residents, place them on an equal footing. The statute was not arbitrary, a legitimate exercise of legislative power and discretion: 115 708, 39 South. 850.

The tax was levied in obedience to the law of the state, and the question here is whether there is anything in the constitution of the United States which forbids it. The answer to that question depends upon whether the property taxed was within the territorial jurisdiction of the state. Property situated without that jurisdiction beyond the state's taxing power, and the exaction of a tax upon it is in violation of the fourteenth amendment to the constitution: *Missville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 23 Sup. Ct. Rep. 47 L. ed. 513; *Delaware L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 25 Sup. Ct. Rep. 669, 49 L. ed. 1077; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. Rep. 36, 50 L. ed.

But personal property may be taxed in its permanent abiding place, although the domicile of the owner is elsewhere. It is usually easy to determine the taxable situs of tangible personal property. But where personal property is intangible, and consists, as in this case, of credits reduced to the concrete form of promissory notes, the inquiry is complicated not only by the fiction that the domicile of personal property follows that of its owner, but also by the doctrine, based upon historical reasons, that where debts are assumed the form of bonds or other specialties, they are regarded for some purposes as being the property itself, and not the representative of it, and may have a taxable situs of their own. How far promissory notes are assimilated to specialties in respect of this doctrine need not now be considered.

The question in this case is controlled by the authority of the previous decisions of this court. Taxes under this law of Louisiana have been twice considered here, and assessments upon credits arising from investments in the state have been sustained. A tax on credits evidenced by notes secured by mortgages was sustained where the owner, a nonresident, who had inherited them, left them in Louisiana in the possession of an agent, who collected the principal and interest as they became due: *New Orleans v. Stempel*, 175 U. S. 309, 20 Sup. Ct. Rep. 110, 44 L. ed. 174. Again, it was held that where a foreign banking company did business in New Orleans, and through its agent lent money which was evidenced by checks drawn upon the bank, treated as overdrafts and secured by collateral, the checks and collateral remaining in the hands of the agent until the transactions were closed, the credits thus evidenced were taxable in Louisiana: *State Assessors v. Comptoir National D'Escompte*, 191 U. S. 388, 24 Sup. Ct. Rep. 109, 48 L. ed. 232. In both of these cases the written evidence of the credits were continuously present in the state, and their presence was clearly the dominant factor in the decision.

sions. Here, the notes, though present in the state at all times when they were needed, were not continuously present, and during the greater part of their lifetime were absent and at their owner's domicile. Between these two decisions came the case of *Bristol v. Wilmington County*, 177 U. S. 133, 20 Sup. Ct. Rep. 585, 44 L. ed. 100. It appeared in that case that a resident of New York was engaged through an agent, in the business of lending money in Minnesota secured by mortgages on real property. The notes were made to the order of the nonresident, though payable in Minnesota, and the mortgages ran to her. The agent made the loans, took and kept the notes and securities, collected the interest, and received payments. The property thus invested continued to be taxed without protest in Minnesota until finally the course of business was changed by sending the notes to the domicile of the owner in New York, where they were kept by her. The mortgages were, however, retained by the agent in Minnesota, though his power to discharge them was revoked. The interest was paid to the agent and the notes forwarded to him for collection when due. Taxes levied after this change in the business were in dispute in the case. In delivering the opinion of the court, Mr. Chief Justice Fuller said: 'Nevertheless, the business of loaning money through the agency in Minnesota was continued during these years, just as it had been carried on before, and we agree with the circuit court that the fact that the notes were sent to New York, *Bristol* in New York, and the fact of the revocation of the power of attorney, did not exempt these investments from taxation under the statutes, as expounded in the decision to which we have referred.'

"Referring to the case of *New Orleans v. Stempel*, the chief justice said:

" 'There the money, notes and evidences of credits were in Louisiana, though their owners resided elsewhere. Still, under the circumstances of the case before us, we think, as we have said, that the mere sending of the notes to New York and the revocation of the power of attorney did not take these investments out of the state.'

" 'Persons are not permitted to avail themselves, for their benefit, of the laws of a state in the conduct of business within its limits, and then to escape their due contribution to the public treasury through action of this sort, whether taken for convenience or otherwise by design.'

"Accordingly it was held that the tax was not forbidden by the federal constitution.

"In this case the controlling consideration was the presence in the state of the capital employed in the business of lending money, and the fact that the notes were not continuously present was regarded as immaterial. It is impossible to distinguish the case now before us from the *Bristol* case. Here the loans were negotiated, the notes signed, the security taken, the interest collected, and the debts paid within the state. The notes and securities were in Louisiana when

for the business exigencies required them to be there. Their removal with the intent that they shall return whenever needed, their long-continued, though not permanent, absence, cannot have the effect of treating them as the representatives of investments in business and thus depriving the state from its taxing power. The law may well regard the place of their origin, to which they intend to return, as their true domicile, and leave out of account temporary absences, however long continued. Moreover, neither the fiction that personal property follows the domicile of its owner, nor the doctrine that credits evidenced by bonds or notes may have the situs of the latter, can be allowed to obscure the truth: *Blackstone v. Miller*, 188 U. S. 189, 23 Op. Ct. Rep. 277, 47 L. ed. 439. We are not dealing here merely with a single credit or a series of separate credits, but with a business. The insurance company chose to enter into the business of lending money within the state of Louisiana, and employed a local agent to conduct that business. It was conducted under the laws of the state. The state undertook to tax the capital employed in the business precisely as it taxed the capital of its own citizens in like situation. In the purpose of arriving at the amount of capital actually employed, it caused the credits arising out of the business to be assessed. We think the state had the power to do this, and that a foreigner doing business cannot escape taxation upon his capital by removing temporarily from the state evidences of credits in the form of notes. Under such circumstances they have a taxable situs in the state of their origin.

"The judgment of the supreme court of Louisiana is affirmed."

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## STATE v. FREDDY.

[117 La. 122, 41 South. 436.]

**INCEST—Consent.**—The consent of both parties is not essential to the crime of incest. (p. 196.)

**WITNESSES—Compulsory Attendance.**—If an accused has taken the required oath, he is entitled, as a matter of right, to summon witnesses beyond the statutory number allowed him. (p. 200.)

**WITNESSES—Part of Conversation.**—A witness may testify to the part of a conversation heard by him. (p. 201.)

Ellis & McGregor, for the appellant.

W. Guion, attorney general, and J. R. McIntosh, district attorney, and L. Guion, for the state.

**PROVOSTY, J.** Defendant was convicted of incest, and sentenced to twenty years at hard labor. The accusa-

tion is that he had sexual intercourse with his daughter without her consent.

His first reliance is upon the refusal of the court to characterize that consent of both parties as essential to incest.

The question thus raised is presented to this court for the first time. It was not considered in the case of *State v. De Hart*, 109 La. 570, 33 South. 605.

For the definition of our crimes, we are referred by the act of 1805 to the common law of England, as it existed at that date; but incest was not a crime cognizable at common law in 1805 (*State v. Smith*, 30 La. Ann. 846); and hence our statute making it a crime must be interpreted unaided by the light of the common law. It is Act No. 78 of 1805, page 101, and reads as follows:

"An act to define the crime of incest and provide for the punishment thereof.

"Whoever shall hereafter knowingly intermarry, or cohabit without marriage, being within the degrees of consanguinity within which marriage is prohibited by articles 84 and 95 of the Revised Civil Code of the state of Louisiana, shall be deemed guilty of the crime of incest."

The question to be considered is whether the word "cohabit," as used in this statute, implies, or not, the concurrent will of the parties.

Summarized, the argument of the learned counsel for the defendant is that whether we read this statute in the light of the definition of the word "cohabit," or in the light of the motives underlying its enactment, or in the light of numerous decisions of the courts of sister states, interpreting similar statutes, <sup>123</sup> we are bound to understand it as requiring the consent of both parties. That the definition of cohabit, both by the dictionaries and the courts, is "to dwell together as husband and wife," which describes a relation implying the consent of both parties. That the motive of the statute is twofold: To guard against degenerate offspring, and to avoid the scandalous spectacle of persons so nearly related holding themselves out to the world as husband and wife; and that neither of these things is possible unless both parties are consenting. That the following decisions hold that the consent of both parties is an essential element of incest, to wit: *People v. Jenness*, 5 Mich. 305; *De Groat v. People*, 39 Mich.



4; *People v. Burwell*, 106 Mich. 27, 63 N. W. 986; *People v. Skutt*, 96 Mich. 449, 56 N. W. 11; *State v. Ellis*, 74 Mo. 5, 41 Am. Rep. 321; *State v. Eding*, 141 Mo. 281, 42 S. W. 5; *State v. Jarvis*, 20 Or. 437, 23 Am. St. Rep. 141, 26 Pac. 2; *Noble v. State*, 22 Ohio, 541; *State v. Thomas*, 53 Iowa, 4, 4 N. W. 908; *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691; *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733; *State v. Fritts*, 48 Ark. 66, 2 S. W. 256.

As illustrative of the meaning of the word "cohabit," the learned counsel cite the decision of the supreme court of the United States in the case of *Cannon v. United States*, 136 U. S. 55, 6 Sup. Ct. Rep. 278, 29 L. ed. 561, where, in interpreting the statute against polygamy, the court said that: "The offense of cohabiting with more than one woman is committed by a man who so associates with two women as to hold them out to the world as his wives, and it is not essential to the commission of the crime that he should have had sexual intercourse with either of them."

From this, the learned counsel deduce the conclusion that sexual intercourse is not essential to incest; but that the crime is committed by the parties if, without any act of sexual intercourse, they merely hold themselves out to the world as living together as husband and wife.

<sup>124</sup> We are not impressed by this argument. The etymological meaning of the word "cohabit" is simply "to dwell together." The acquired meaning varies, necessarily, with the connection in which the word is used. In the present statute, we think the meaning is simply that of sexual intercourse, as in our laws upon marriage and legitimacy. The statute and these laws may be said to be kindred legislation; the statute merely, as it were, adding the sanction of punishment to the prohibitions contained in these laws against the union of persons within the prohibited degrees of relationship.

When the statute makes use of the expression "shall intermarry, or cohabit without marriage," it uses the word "cohabit" in the same sense as do the articles 188 and 189, Revised Civil Code, when they speak of the possibility of the husband's "cohabiting" with his wife. These articles do not use the word in the sense of the possibility of the husband's "dwelling with his wife," or of the possibility

of his "holding her out to the world as his wife," but simply of the possibility of his having access to her: *Tate v. Pennington*, 7 Mart. (N. S.) 548.

Article 111 of the Code provides that a marriage celebrated without the free consent of both parties may be annulled, provided the parties have not "freely and without constraint cohabited together after recovering their liberty."

Commenting on the corresponding article of the Code of Napoleon, which, unlike ours, requires that the cohabitation shall have lasted six months, Marcadé says: "Tacit ratification results, according to terms of article 181, from a cohabitation continued during six months after the recovery of liberty, or after the discovery of the error. It could not be found in any other circumstances whatever. Thus, the pregnancy of the woman, even if occurring after the discovery of the error, or after the recovery of liberty, would be inefficacious. For this pregnancy simply proves that there has been cohabitation; whereas, it is not any kind of cohabitation that the law requires, but one that has continued for six months."

<sup>125</sup> Thus, the great commentator uses the word "cohabitation" in the sense of congress. And our article 111 manifestly uses it in the same sense. No one could doubt that a marriage would be ratified by the voluntary cohabitation of the parties in the sense of sexual intercourse, irrespective of any dwelling together.

So far as concerns the underlying motives of the statute we need not go elaborately into them. Suffice it that we know that the statute has been dictated by the moral sense of the community, to which the sexual intercourse of persons within the prohibited degrees is abhorrent. Beyond the ascertainment of the existence of this moral sense, and that it was it that dictated the statute, we see no use in going further. Beyond that point, the question ceases to be one of law, and of the interpretation of statutes, and degenerates into one purely of sociology. The inquiring student, however, who wishes to know why such unions are deemed unnatural, and why they are offensive to the moral sense of modern society, will find the matter fully discussed in connection with the laws that fix the degrees of relationship within which marriage is prohibited. The French commentators are copious on the subject, and Montesquieu, *Esprit des Lois*, book

ter 15, is interesting. The sexual intercourse within prohibited degrees is just as offensive to the moral sense of the community if accomplished by force or fraud as if accomplished by consent, and, hence, is as much within the scope of the statute in the one case as in the other.

Coming to the decisions of the courts of other states interpreting statutes on the subject of incest, we note, first of all, that these decisions can be of assistance only in so far as the reasoning by which they are supported is applicable to our statute. In other words, incest not being a common-law offense, these decisions have no common-law authority. As observed by Mr. Wharton, in speaking <sup>126</sup> of incest: "From the reason that the subject is generally absorbed by statute, the decision of its common-law character is to be cited": Wharton on Criminal Law, 7th ed., sec. 2669a. If we consult the decisions, however, we find them to be fairly divided: 16 Am. & Eng. Ency. of Law, 135. To the list there may be added the recent cases of *Davis v. People*, 204 Ill. 266, 68 N. E. 540, and *People v. Stratton* 141 Cal. 604, 171 Pac. 166—both well-reasoned decisions, and against the necessity of consent.

The decisions on the affirmative side of the question are based upon the phrase "with each other," found in the statutes they interpret, from which, it is thought, there arises an implication of the necessity of concurrent consent. These words are not found in our statute. Though, it must be confessed, an implication of the necessity of concurrence results just as strongly from the single word "cohabit," since the cohabitation cannot but be "with each other." But the aim of the statute is to prevent the unnatural sexual intercourse, and this intercourse exists none the less if accomplished against the will of one of the parties, and the fact is none the less incest because it happens also to be rape. The defendant presented the following motion duly sworn to: "Defendant in this case now moves the court for a subpoena for Mrs. Tom Johnson residing in this parish. Represents that he has already six witnesses summoned on his part, but now finds that the said Mrs. Johnson is a material and important witness on his behalf, shows that he expects to prove by said Mrs. Johnson that the general character of the prosecuting witness in this case is very bad and corrupt, and that, if the testimony of this witness is submitted

to the jury, he believes that they will give very little, if a weight to the testimony of said prosecuting witness."

The court denied the motion for the following reasons:

"By the Court.—The application was refused for the following reasons, to wit: Defendant has already summoned the number of witnesses allowed by law, and for the further reason that in the opinion of the court the application <sup>127</sup> and affidavit was insufficient and the evidence inadmissible."

The learned judge does not say wherein this application is insufficient, and for our part we are unable to see why it should have been considered so. It seems to conform with Act No. 67 of 1894, page 78. What is expected to be proved by the witness is stated, and also why and how the same is material, and the application is sworn to. True, it does not say how far the witness resides from the courthouse, but it does say that she resides in the parish, and Richland is not a very large parish, and the parish seat is in the center; and, moreover, the attorney general says in his brief that the witness resided only ten or twelve miles from the courthouse. Distance, therefore, offered no good reason for refusing the application. As a matter of fact, there proved to be abundant time to get the witness. The motion was offered on Monday morning, and the defense did not close its evidence until Tuesday afternoon. The motion did not call for a postponement of the trial.

The impeachment of the prosecuting witness, the main point, not the only, witness against him, was very important to the accused, and evidence as to the general character of the prosecuting witness was certainly not inadmissible: State v. Guy, 106 La. 8, 30 South. 268.

Because the defendant had already summoned six witnesses was good reason for making the application, but surely no reason for refusing it. The statute says that the party "shall not be allowed to summon more than six witnesses unless" the showing is made. This can only mean that where the showing is made, the right to the summons follows as a matter of course. In all cases where the application is in due form, perhaps the safer rule for our brethren of the district bench would be to grant it; and to put off the consideration of its timeliness until application comes for postponement or <sup>128</sup> suspension of the trial to await the arrival

witness or the returns of the sheriff. It can then be shown with more certainty whether there was or not time to secure the presence of the witness, and whether therefore the application was timely. We will add that we are not to be understood as saying that the showing in this case was sufficient for a postponement of the trial, but simply for ordering the subpoena to issue.

On this ground the judgment will have to be set aside, and the case remanded.

The next objection is to the ruling permitting a witness to testify to a conversation of which he had heard only a part. The ruling was correct: *State v. Allen*, 111 La. 154, 35 South. 56; *State v. Daniels*, 49 La. Ann. 954, 22 South. 415; *State v. Vallery*, 47 La. Ann. 182, 49 Am. St. Rep. 363, 16 South. 56; *Elliott on Evidence*, sec. 241, note 174; 1 Am. & Eng. Cyc. of Law, 722; 16 Cyc. 1037, note 14.

The next objection is stated differently by counsel and the judge, and this court must accept the statement of the judge. The statement of counsel is that the prosecuting witness and other witnesses for the state having testified that the defendant had always been unreasonably severe with the prosecuting witness, his daughter, the defendant was denied the right to testify to the reason why he had been thus severe. The statement of the judge is that this matter of the severity of the defendant was brought out by the defendant himself on cross-examination of the state's witnesses, and that it was an irrelevant matter. Under these circumstances, the ruling is correct. The defendant cannot cross-examine the state's witnesses as to irrelevant matters, for the purpose of afterward contradicting them, or for the purpose of opening the door to testimony on such irrelevant matters. That is a plain proposition.

The misunderstanding between the judge and counsel in regard to the giving of a <sup>120</sup> written charge is not likely to occur again, and hence need not be gone into.

Judgment is set aside, and case remanded for trial.

Land, J., dissents from the ruling on point of defendant's legal right to summon the witness during the trial, but otherwise concurs in the opinion.

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*The Crime of Incest* is the subject of a monographic note to Taggart *State*, 111 Am. St. Rep. 19.

## STANLEY v. SCHUMPERT.

[117 La. 255, 41 South. 565.]

**PHYSICIANS AND SURGEONS—Negligence of Nurse.** Trained Nurse in a Sanitarium must exert her best endeavors to avoid mistakes of any kind in relation to a patient who is under the care of the sanitarium, and as to whom the physician in charge thereof must exercise due care to see that medicines are properly administered. (p. 207.)

**PHYSICIANS AND SURGEONS—Negligence of Nurse.**—The functions of a trained nurse are sufficiently important to render her and her employer liable in damages for negligently inflicting injury upon a patient in their charge and under their care. (p. 207.)

Pugh, Thigpen & Foster, for the appellant.

Alexander & Wilkinson and Thomas & Herold, for appellees.

**256** BREAU, C. J. The action is one sounding in damages, which plaintiff in his petition fixes at five thousand dollars.

In May, 1904, plaintiff called on Dr. Dowling, an oculist in the city of Shreveport, to have his eyes treated. The physician suggested that during the treatment he should stay at the Shreveport Sanitarium. His physician prescribed a mild solution to be applied under the direction of a trained nurse. On one of the early days in June of that year one of the nurses of the institution, owing to carelessness, applied alcohol instead of the mild solution prescribed by the physician.

Plaintiff avers that he suffered on that account excruciating pain, lost his eyesight, and that now he is entirely blind.

Defendants severed in their defense. Dr. Willis, one of the defendants, in an exception, averred that at the time of the accident he was no longer in the Shreveport Sanitarium. Dr. Schumpert also denied all connection with the institution. Dr. Abramson, the other defendant, sets up as his defense that plaintiff had been under the treatment of Dr. Dowling, and that he was admitted in the institution as his patient, and plaintiff's contract with the institution was exclusively for board and lodging, and for the service

a nurse to wait on him under the direction or supervision of his physician; that he had naught to do with the case; that <sup>257</sup> he was exclusively under the treatment of his physician.

The foregoing is an abbreviated statement of the pleas and counter-pleas of plaintiff and defendants.

The case was tried before a jury and decided for defendants. From the verdict and judgment plaintiff appeals.

The plaintiff is a farmer who resides in one of the parishes adjacent to Caddo. He repaired to Shreveport to have his eye treated by Dr. Dowling. Many years ago he accidentally hit his right eye, from the effects of which it was at first diseased and afterward lost its sight entirely. In the year 1900 it was completely blind. He was advised by his physician before named to have his eye removed, for it would only be a question of time when it would cause the loss of the other eye, through sympathetic infection. The eye was not removed. Some time thereafter plaintiff was called on by his physician, who found him suffering with an ulcer on the cornea of the left eye. It was painful to him. He was exceedingly sensitive to the light. He dreaded it. He could see only a short distance, a few feet. It was at that time that the physician advised him to go to the sanitarium, where he would be better able to take care of his remaining eye, and where he might have it looked after regularly by nurses who would apply the remedies prescribed. He prescribed for him and gave the nurses directions as to what medicines to use; how, and the time to use them.

No other physician treated him. The nurse, under the physician's prescription, only had to drop some solution prepared for the purpose into the plaintiff's eye with an ordinary medicine dropper.

One of the nurses who happened to be in charge of plaintiff's ward undertook to administer the solution. She did administer the mild solution prescribed. Instead, through negligence, she put the dropper into <sup>258</sup> alcohol and dropped alcohol freely into plaintiff's eye.

The testimony shows that all the bottles were properly labeled. The alcohol caused intense pain, but did not destroy the sight.

When plaintiff testified it appears that he had no ulcer in the left eye. The physician also testified that he had

no ulcer on the cornea, and that he could see somewhat better than when he called on him and consulted him before the accident.

Condition of plaintiff's eyes in 1904, before the accident:

"He suffered from ulceration of the cornea. The eye that he had lost and the remaining eye were greatly inflamed. His pain was excruciating. He could distinguish the fingers of the hand placed before him at about two feet. Ulcer was the cause."

Condition of plaintiff's eyes at the date of the trial:

"The ulcer on the cornea of his eye was cured. His eyes were not inflamed, nor were they painful to him. He could see and distinguish the fingers of his physician's hand at a distance of about nine feet. There were spots on his eyes, caused by scars, which very much impeded his vision."

The defense sets up that it was not possible to inject into the eye as much alcohol as plaintiff contends. That the structure is such that alcohol or any other liquid is admitted in small quantity only. The testimony of witnesses described the cornea of the eye with some particularity. Its mechanism and composition, we will state, is in thickness, as they testified, about the thirty-second part of an inch, and has five layers.

Before closing the statement of facts, it is proper we should state that the testimony shows that an ulcer on the cornea is a diseased condition of the tissues and brings on suppuration, for which alcohol is sometimes prescribed as a remedy.

At the time that plaintiff's eye was examined by the physician, a few days before the accident, the iris of the eye had become involved.

The testimony shows that alcohol is an antiseptic. It is in evidence that the proper application of alcohol consists in dipping the cotton on the applicator into the alcohol, shake it so that there will be no loose alcohol <sup>259</sup> to fall on the tissues, which should not be touched. It is also in evidence that the application is not scientific which consists in pouring or injecting it into an eye with a medicine dropper.

We leave the statement of facts convinced that the nurse was not very careful, and that it was negligent on her part to apply, as she did, the alcohol, instead of the solution which was intended to ease and soothe the diseased eye.

In deciding, we take up the demand of plaintiff directed against Dr. Willis. The testimony shows that he is not liable. He was not at the time owner or lessee of the sani-



ium. He never had charge of plaintiff's case. This ends suit as to him.

We take up, in the next place, the case against Dr. Schum-  
t. We have seen that his defense was that he had leased  
sanitarium to Dr. Abramson, the other defendant, who  
lessee was alone responsible for the management. The  
se had been employed while Dr. Schumpert was in charge.  
the sanitarium, and the plaintiff had been received at the  
stitution while he was the owner and in charge; but a few  
s thereafter, before the accident, he leased to Dr. Abram-

The lease went into effect on the 1st of June. It was  
er that time that the nurse committed the mistake.

Plaintiff had no reason to be interested in the change  
m Dr. Schumpert to Dr. Abramson, lessee. No personal  
sideration entered into the case. Plaintiff had been ad-  
ted to the sanitarium to be treated by his own physician,  
whether it was in charge of Dr. Schumpert or Dr.  
ramson was not a matter in which plaintiff was con-  
ned.

There is a very similar case, viz.: Property had passed  
n one to another without recording evidence of the fact.  
court held that the new owner was liable for the tort.  
plaintiff was not in any way concerned as <sup>260</sup> to the  
ty against whom to bring his action: Goodwin v. Bodcaw  
nber Co., 109 La. 1050, 34 South. 74.

Moreover, plaintiff's contract with the sanitarium was not  
any limited time. He was a day patient of the institu-  
, and remained there from day to day.

We do not think that plaintiff has a cause of action against  
Schumpert.

Defendant's next contention is that, even if injury had  
n inflicted by the nurse, yet under the evidence defendant  
ot liable.

In support of this position, defendants aver that they are  
liable for the fault of the nurse, they were not present,  
knew nothing of her mistake. In support of that  
tion defendants invoke article 2320 of the code, which  
s as follows: "Masters and employers are answerable  
the damage occasioned by their servants and overseers,  
ne exercise of the functions in which they are employed."

In the above cases responsibility only attaches when the masters or employers might have prevented the act which caused the damage and not have done it.

The court has been called upon a number of times to interpret that article, and has never taken the restricted view that a defendant is liable only when present and when he could have prevented the act.

We are not inclined to take an extreme view upon the subject. We must say, however, that cases may arise of the master's liability, although not actually present.

It is a presumption that the employer exercises some influence over his employés and that under that influence employés will not be prone to negligently injure others. That they, nurses, for instance, will show proper care of those placed in their charge, because of the duty to the employer, the performance of which it devolves upon the employer to require.

We can only cite here the different decisions upon the subject, which are a complete answer to the contention of the defendant: <sup>261</sup> Hart v. New Orleans & C. R. R. Co., 1 Rob. 178, 36 Am. Dec. 689; Nelson v. Crescent City R. R. Co., 4 La. Ann. 491, 21 South. 635; Anderson v. Elder, 105 La. 672, 30 South. 120; Evans v. Louisiana Lumber Co., 111 La. 534, 35 South. 736.

Defendant's next ground is that plaintiff was not injured by dropping alcohol in his eye.

A careful consideration of the testimony has not enabled us to find that plaintiff had been permanently injured. No one of the number of physicians who testified, either for plaintiff or for defendant, said that there was probability that the alcohol had destroyed or injured plaintiff's eyesight. Plaintiff's eyesight is no weaker now than it was before the accident. He does not suffer with an ulcer. There are opaque spots on the cornea, but the testimony does not show that they were caused by the alcohol. True, he is nearly blind. But his eyesight has always been weak. While specialists as witnesses did not approve of the manner the alcohol was administered to the eye, they said that the proper application of alcohol to the eye has no effect of an injurious character. Alcohol does not destroy when applied to an eye, even if it be sore.

We do not find that there was injury.

This brings us to the question of plaintiff's suffering.

The patient did not suffer as much as one of the witnesses could have it, although he must have suffered pain for a moment.

A nurse should exert her best endeavors to avoid mistakes of any kind, as they are sometimes attended in the sick-room with the saddest consequences.

The only remaining question for decision is whether the sanitarium is liable for the pain caused by the mistake of the nurse, for unquestionably, as before stated, there was negligence.

The proprietor of a drugstore has been held liable for the mistake of his clerk. The general responsibility of a druggist and of his <sup>262</sup> clerk is greater than are the duties of the nurse. None the less, the functions of the nurse are sufficiently important to render her and her employers liable for damages for inflicting pain negligently. This nurse was employed by the sanitarium and had charge of plaintiff's care in accordance with his contract of employment. She was acting for the sanitarium under the direction of plaintiff's physician. Her duty was to carry out the orders of the physician, and it was the duty of the sanitarium to see that she carried out the orders devolving upon her as a nurse.

The physician could have had another nurse called in her place, but he had no right to discharge her. The management of the sanitarium had the right of control and of discharge.

We think that the plaintiff should recover something for the intense suffering, though momentary, which the negligent mistake occasioned.

It is therefore ordered, adjudged and decreed that the verdict and judgment are amended by condemning the defendant Dr. Lewis Abramson to pay \$25, and as amended judgment appealed from is affirmed, at defendant's and appellee's (Abramson's) costs in both courts, except as respects to suit and appeal of Drs. Schumpert and Miller; costs of these to be paid by appellant.

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*The Liability of Physicians and Surgeons* for negligence or malpractice is discussed in the monographic note to *Gillette v. Tucker*, 93 St. Rep. 657.

*The Liability of Persons Maintaining Hospitals* for the negligence of employes and surgeons in their care and treatment of patients is discussed in *Downes v. Harper Hospital*, 101 Mich. 555, 45 Am. St. Rep. 427; *Sawdey v. Spokane Falls etc. Ry. Co.*, 30 Wash. 349, 94 St. Rep. 880.

## STATE v. JAHRAUS.

[117 La. 286, 41 South. 575.]

**ESTOPPEL Against State—Acts of Defaulting Public Officer.**—A state is not estopped by the illegal acts of its unfaithful and defaulting public officer. (p. 210.)

**PUBLIC OFFICERS—Liability of State for Acts of.**—A state is not liable for wrongs or negligence committed by its public officers. (p. 210.)

**BILLS AND NOTES—Checks—Notice to Payee.**—A person who is dealing with a tax collector personally and accepts his check signed "John A. Perkins, T. C.," is bound to know that "T. C." stands for tax collector, and that he has accepted the officer's check upon his trust fund held for the state. (p. 212.)

**BILLS AND NOTES—Checks—Notice to Payee.**—A person who accepts the check of a tax collector on funds collected by him for the state must be held to have known that such officer had no right to dispose of such fund, except to make settlements with the state. (p. 213.)

**EVIDENCE—Presumptions—Failure to Testify.**—If a defendant can, by his testimony, throw much light on the negotiation or matter in dispute necessary to his defense and peculiarly within his knowledge, and he fails to take the witness-stand, it will be presumed that such necessary facts do not exist. (pp. 213, 214.)

W. S. Parkerson, for the appellant.

W. Guion, attorney general, and Miller, Dufour & Guion, for the appellee.

<sup>286</sup> **BREAUX, C. J.** This suit was brought by the state to recover the sum of three thousand seven hundred and fifty-five dollars and sixty-one cents, <sup>287</sup> with interest, from the succession of the late Arthur Jahraus. The charge of the state is, as relates to the ex-sheriff of Calcasieu parish, John A. Perkins, that he collected taxes for her which he failed to turn over to the auditor.

The state charges that Jahraus knew that Perkins was sheriff at the time that he received from him different sums of money in checks; that Jahraus knew that the funds against which the checks were drawn were not the property of Perkins, but of the state; and that Perkins signed the checks as drawer in his official capacity.

The defendant denied all indebtedness on his part, and specially averred that the state is estopped by reason of the fact that through her auditor she failed to require the sheriff to make his returns and settlement as the law requires.

It appears that John A. Perkins was elected sheriff in the year 1900, that it became known that he was a defaulter in the year 1904, and that he is now a fugitive from justice.

It is a fact shown by the testimony that in the early part of the year 1904, a short time before Perkins' defalcation was discovered, the late Mr. Jahraus received from him as sheriff checks drawn against the account which he kept as sheriff and tax collector in the Bank of Calcasieu and in the First National Bank of Lake Charles.

At first the sheriff kept a personal bank account and a separate account as tax collector. In the year 1902 he ceased to keep this personal account, and only kept an account as tax collector, against which he drew indiscriminately, personally and as tax collector.

Whilst in this city checks were signed by "John A. Perkins, T. C.," and transferred by delivery to Jahraus. They were deposited by the holder, Jahraus, in the Whitney National Bank for collection, through which <sup>288</sup> they were collected, and the amount was placed to his credit in that bank.

The case went to trial on the issues suggested by the foregoing, and on the trial, it was shown that the sheriff was a defaulter for a large amount; that, although a large sum was collected through his sureties and other sources, there still remains due to the state an amount largely in excess of the amount for which the state sues in this case.

At the outset of the discussion we readily state that we agree with the learned counsel for the defendant in the statement that the law does not require the tax collector to make a deposit in any particular bank. There may be a rule of the tax-collecting department requiring such a deposit which is safe to follow, but we have found no statute on this subject.

We may as well state here, although the law does not require the deposit, yet, if deposit be made, the state may receive her funds to it, if it consists of her funds, or of funds out of which she can require payment.

It is also unquestionably true, as stated by learned counsel, that the state requires the sheriff or ex-officio tax collector to make due returns of his collections within the first ten days of January, April, July, and October, and that he must make a final settlement within ten days after the 20th of each month of each year. It becomes the duty of the auditor, in

case of the sheriff's failure to thus settle, to bring the matter to the attention of the district attorney, and the judge of the district court is required to place the matter before the grand jury.

This was not done, although the sheriff had not settled as required.

The defendant grounds his plea of estoppel on the fact that the sheriff was always tardy, never in time at all, and in two instances made no settlement.

Under the authorities we feel constrained to hold that even if the auditor was slow <sup>and</sup> in requiring settlement, and the judge and the district attorney did nothing in the matter, and even if, in consequence of these facts, the defaulting officer continued in the enjoyment of public confidence, and he had discharged all the duties incumbent upon him, the state is not estopped. It cannot well be held bound by the illegal acts of the officer who squandered her revenues and defaulted in his payments. It is well settled that "sureties on the bond of an officer cannot avail themselves of the laches or omissions of other officers of the state in the performance of duties imposed by law as a ground of discharge for their own liability."

The foregoing citation is sustained substantially by a number of decisions of this court: *State v. Powell*, 40 La. Ann. 234, 8 Am. St. Rep. 522, 4 South. 46; *State v. Powell*, 40 La. Ann. 241, 4 South. 447; *Eastin v. School Directors*, 40 La. Ann. 705, 4 South. 880; *Police Jury v. Tax Collector*, 31 La. Ann. 736; *Louisiana v. Guilbeau*, 37 La. Ann. 712; *State v. Lanier*, 31 La. Ann. 423; *State v. Lake*, 45 La. Ann. 1207, 14 South. 126.

The question is whether under authority we should go further and hold that third persons (different from sureties) fall within the same rule.

It has been decided that the government is not liable for the wrongs committed by its officers, even where third persons are concerned; that it is not bound by the neglect of its officers; that the acquired rights of the government cannot be destroyed by the laches of its agents: *Gibbons v. United States*, 8 Wall. (U. S.) 269, 19 L. ed. 453; *United States v. Kirkpatrick*, 9 Wheat. (U. S.) 720, 6 L. ed. 1; *United States v. Van Zandt*, 11 Wheat. (U. S.) 184, 6 L. ed. 448; *United States v. Nicholl*, 12 Wheat. (U. S.) 505, 6

709; Jones v. United States, 18 Wall. (U. S.) 662, 21 L. 367; Shields v. Ohio, 9 U. S. 319, 24 L. ed. 357.

True, the state may in certain instances be estopped; we have never found that <sup>290</sup> the state was held estopped on account of the acts of an unfaithful and defaulting officer.

There are a number of decisions in matter of tax collection and assessment, some of which have been cited by counsel for defendant, in which it was decided, if a person has been injured by the action of the state, the state should be held to indemnification.

These decisions are: State v. Ober, 34 La. Ann. 359; Louisiana v. North Louisiana & T. R. R. Co., 25 La. Ann. Louisiana v. Taylor, 28 La. Ann. 460; Mower v. Kemp, La. Ann. 1007, 8 South. 830; Vicksburg etc. R. R. Co. v. State, 41 La. Ann. 896, 6 South. 725; Folger v. Palmer, 35 La. Ann. 743.

In these cases there was no question of a defalcation of an officer. The error invoked against the state grew out of a statute or act of some officer who had acted within the limits of his authority.

For instance, in the matter of taxation, the amount which should be retained by the state, it may become a matter of public faith to retain the amount if not due. But here a different question entirely presents itself, as we have before said.

No decision has been cited in which it was held that the dishonesty and subsequent defalcation of an officer was sufficient upon which to base an estoppel. Neither have we found in our own researches any such decision. At the moment defalcation is disclosed, policy requires that disclosure be made which no plea of estoppel can pre-

vent us to leave that plea convinced that it cannot be of any

effect. We will here mention in passing that in argument at bar nothing was said incidentally by one of the counsel about the implied and resulting trust which gave a right of recovery to the state to the amount claimed.

We easily dispose of that ground by stating <sup>291</sup> that there is no lien save that created by law.

If we were to stop here in the discussion, we would find the defendant by reason of the fact that the state has

no right springing from any sort of implied or resulting trust or lien. It is exclusively a question of ownership. If the money was not owned by the state, she is not entitled to judgment.

The question is all-important.

We feel at liberty to state that if, at any time during the discussion and before the case is finally decided, it should appear with reasonable certainty that the state is not the owner of the fund, from that moment it will be determined that the defendant is not liable.

It is the money of the state for the following reasons:

The total state taxes for the year 1903 were ninety-seven thousand two hundred and twelve dollars and thirteen cents. He owed licenses in addition. His deposits show no amount equal to this indebtedness to the state. On the contrary, his was always less, both in the year 1903 and in the year 1904.

We will again state, in other words, that all his collections as sheriff deposited with the banks before named, which were the banks in which he made his deposits, were less than the amounts owed to the state, to the parish, and to the school board.

We will here state incidentally that there is no question here of an amount due for commissions, or of any private funds deposited by him in this sheriff's account fund. It was not shown that he ever deposited a cent of his own money on his credit on this account. It was exclusively his account for taxes collected.

The question suggests itself: Was the defendant sufficiently placed upon inquiry by the fact that the sheriff signed the check "John A. Perkins, T. C."?

He was dealing with Perkins personally. He knew he should have known it. He <sup>292</sup> should not have accepted a check of the sheriff upon his trust fund.

"T. C." evidently means "Tax Collector." It is requisite that special heed be given to the capacity of the drawer.

The weakness of defendant's defense in the suit is illustrated by the following: A is agent of B. C knows that B is agent, and that A keeps an account to the credit of B. A as agent hands his check to C, who accepts it and collects the amount. That is the end of the matter, if C knows nothing of the purpose for which A has drawn the check. He may assume that it was in connection with his agency, and that is the end of the matter. But if C knows that A



agent, and that he positively had no right to draw on fund deposited to B's credit, except for the one purpose settling with A, his principal, and he accepts a check and accepts the amount thereon, C might be made to refund.

ere the defendant somewhat similarly accepted a check he tax collector on funds collected by him for the state. defendant must be held to have known that the sheriff no right to dispose of that fund except to make settlements with the state. It is the express law of the state, of which everyone must take notice and be on his guard.

is dealings were with Perkins personally. As a question of law, why did he accept a check of "Perkins, T. C."? We did think for a little time that the funds deposited in two banks, before named, by Perkins, were the indebtedness of the banks to Perkins, the depositor, as it is well known that the relation between the depositor and the bank is that of debtor and creditor; but after some reflection and after considering eminent authority we have arrived at a different conclusion.

The syllabus of the decision to which we refer reads as follows: <sup>293</sup> "Although the relation between a bank and depositor is that merely of debtor and creditor, the money which he deposits is held by him in a fiduciary capacity and does not change its character by its being placed to its credit in a bank account": *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. ed. 693.

ere the money was substantially the state's. An officer has no authority to draw out funds of his principal and use them.

The defendant knew or should have known of the trust relations existing between the drawer of the check and the state. True, the fugitive ex-sheriff abbreviated the signature. He did not set out at length that he was drawing as tax collector, but it remained that his initials indicated the fact. It has been decided that initials sufficed: *Sumner v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106, 10 South. 14 L. R. A. 815; *Shattuck v. People*, 5 Ill. 477; *Russ v. State*, 30 Miss. 440; *Rowley v. Berrean*, 12 Ill. 198; *Row v. Hovey*, 41 Mich. 708, 3 N. W. 198.

regard to another proposition which has entered into the discussion of the case—that is, whether the defendant should have testified and explained the nature of the negotiation—we will state that whilst a party to a cause should not

be held too closely to the proof of facts, or of the necessity of appearing in his own cause, yet there are cases in which it does appear that he should testify, and the present case seems to be of that number.

He might have thrown much light upon the negotiations. This he has not chosen to do.

Touching the necessity just mentioned, we cite the following cases: *Nunez v. Bayhi*, 52 La. Ann. 719, 28 South. 125; *King v. Atkins*, 33 La. Ann. 1057; *School Board v. Trimm*, 33 La. Ann. 1073; *Pruyn v. Young*, 51 La. Ann. 320, 28 South. 125; *Bastrop State Bank v. Levy*, 106 La. Ann. 586, 51 South. 164.

It was said in argument that Perkins had collected more funds than those coming to <sup>204</sup> the state; that there were other interested creditors—the parish and the school board.

Reason and authority hold that the state is entitled to preference over the fund, whether collected for the parish or the school board: *State v. Foster*, 5 Wyo. 190, 63 St. Rep. 47, 38 Pac. 926, 29 L. R. A. 226; *Bibbins v. C*, 90 Iowa, 230, 57 N. W. 884, 59 N. W. 290, 29 L. R. A. 115; *Robinson v. Bank of Darien*, 18 Ga. 65; *Jack v. Weien*, 115 Ill. 105, 56 Am. Rep. 129, 3 N. E. 445; *State v. M*, etc., 10 Md. 504; *Orem v. Wrightson*, 51 Md. 34, 34 Am. 286; *State v. Rowse*, 49 Mo. 586; *Smith v. State*, 5 (Md.), 45; *United States v. State Bank*, 6 Pet. (U. S.), 8 L. ed. 308.

We realize that this is a hard case, and have felt some concern about our conclusion. We wish it were otherwise, but in our view of the law it cannot be otherwise.

The judgment is affirmed.

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*A State is not Liable for the Negligence or Misfeasance of its officers or agents, except when such liability is voluntarily assumed by the legislature:* *Bourn v. Hart*, 93 Cal. 321, 27 Am. St. Rep. 203; *Chapman v. State*, 104 Cal. 690, 43 Am. St. Rep. 158; *Carolina Nat. Bank v. State*, 60 S. C. 465, 85 Am. St. Rep. 865.

*The Doctrine of Equitable Estoppel* has no application to a state. Therefore it cannot be estopped on the ground that its agent acted under apparent authority: *Carolina Nat. Bank v. State*, 60 S. C. 465, 85 Am. St. Rep. 865.

## ITZKOVITCH v. WHITAKER.

[117 La. 708, 42 South. 228.]

**INJUNCTION may be Granted to Prevent** the violation of personal rights. (p. 216.)

**INJUNCTION—Photograph for Rogues' Gallery.**—An injunction will lie to prevent the taking of a photograph of a person accused of crime, and from placing such photograph in the rogues' gallery, after his conviction, unless it is clearly shown that it should be there before conviction, either for identification or the detection of crime. (p. 217.)

R. Forman, for the appellant.

Wolff and G. Lemle, for the appellee.

**BREAUX, C. J.** The injunction was to restrain the defendant from having the photograph of plaintiff taken, and from placing a copy of it in the rogues' gallery, and from sending copies to various cities throughout the United States where there are rogues' galleries. The petition for the injunction sets forth plaintiff's alleged grievance at some length, and avers that he is a citizen of the state, is a property owner, pays his taxes, and has always conducted himself in a proper and becoming manner.

Going into particulars, he specially avers, in substance, that on a day stated the police officers took him into their custody, and brought him to the office of the defendant, who was the inspector of police of the city. That he was informed of the cause of his arrest. His picture was taken, after his clothing had been partly taken off. He was measured according to the Bertillon system, adopted for the identification of persons.

Petitioner sets up the hardship he met with, and loudly complains of the treatment to which he was subjected.

The defendant, in his justification, urges that his duty is to prevent crime, detect and arrest offenders, protect the interests of persons and property; that he cannot be lawfully controlled by an injunction from the civil district court; that the judge of the civil district court has no jurisdiction to issue such an injunction, or control him (the inspector) in any manner in the exercise of his lawful functions.

The inspector also sets forth in his answer that the plaintiff has for several years kept a secondhand store, where

secondhand goods are bought and sold; that this pawnshop is kept by him at 403 South Rampart street; "that it is only a fence or place where thieves resort, and find ready sale for stolen property."

The plaintiff is thirty-three years of age. He has been arrested a number of times, and, if the number of charges is a criterion of his activity, he certainly is a very active man.

The judge of the district court perpetuated his injunction ordered the negative of the <sup>710</sup> photographs to be returned and ordered respondent to erase and cancel all records and copies of the photographs and of the measurement made of the plaintiff.

Want of jurisdiction to entertain and decide the question involved is again pressed upon this court's attention by the defendant.

There is no question but that the civil district court has no authority to interfere with police officers whilst in the proper discharge of their functions in criminal matters.

The civil district court is without authority to examine into and interpret a criminal statute: *Lecourt v. Gaster*, La. Ann. 487, 21 South. 646.

The position taken in the first suit by plaintiff was that the action was civil in character, for the protection of personal rights, which did not fall within the terms of the criminal statute.

We sustained that view, and remanded the case.

Here, having taken jurisdiction in the trial of the exception, it attaches until the final determination of the case, unless it becomes manifest that the court had no jurisdiction because of the issues which had arisen since the exception was decided.

We have found no good grounds to hold that the court was divested of jurisdiction. We are sustained in the view that this court has jurisdiction by precedents.

Injunction may be granted if personal rights are violated: 16 Am. & Eng. Ency. of Law, 2d ed., p. 63.

There are cases in their nature criminal which give rise to rights exclusively personal, which may be protected by injunction: 16 Am. & Eng. Ency. of Law, 2d ed., p. 63.

The authority of the civil courts is clearly considered in *Re Debs*, 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39 L. ed. 10

court maintained its jurisdiction in a case not as favorable to jurisdiction as the case now before us.

<sup>1</sup> We quote from the syllabus in *Ryan v. Brown*, 18 Oh. 196, 100 Am. Dec. 154:

A personal grievance constitutes a ground for an interference of equity. Individual rights may be protected in a court of equity, and officers restrained by an injunction": *People v. Canal Board*, 55 N. Y. 390.

Every person who may be subjected to the deprivation of any rights, privileges, or immunities, secured by the constitutional laws, may find protection by injunction": *Tuchman v. Welch* (C. C.), 42 Fed. 548.

The testimony admitted in evidence has not impressed us unfavorably regarding the business conducted by plain-

The complaints against him have been frequent; none the less, it does not appear that he has ever been convicted, and before conviction his picture should not be posted, for it would be a permanent proof of dishonesty.

There may be cases requiring the exercise of the photographer's art for the purpose of identification of a hardened criminal. In the present instance, the case has not developed itself to that point.

The necessity of the picture for identification is not sufficiently shown to justify us in setting aside the judgment.

For reasons assigned, the judgment appealed from is affirmed.

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*Injunctions Against the Publication of Photographs* of the complainant are discussed in the monographic note to *Roberson v. Rochester Folding Box Co.*, 89 Am. St. Rep. 844. It was held in *Itzkovitch v. Whitaker*, 115 La. 479, 112 Am. St. Rep. 272, that an honest and decent person is entitled to an injunction to prevent his photograph from being sent to, published, or exhibited in a rogues' gallery.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**

**MASSACHUSETTS.**

**DALTON v. GIBSON.**

[192 Mass. 1, 77 N. E. 1035.]

**LANDLORD AND TENANT—Right of the Latter's Servant as Against the Former.**—A servant or other employé of a tenant have no greater rights than his employer has arising out of personal injuries due to the condition of the leased premises. (p. 219.)

**LANDLORD AND TENANT—Stipulation for Repairs by Lessee.**—If, by the terms of a lease, the tenant is bound to keep the building, or some specific part thereof, in repair, neither he nor his employés can recover for personal injuries due to want of repair, if the premises were in good condition when the tenancy began. (p. 219.)

**LANDLORD AND TENANT—Repair, Covenant for by Tenant, When not Waived.**—The fact that the landlord did some repairs to the leased premises not in pursuance of any agreement to do so is not an admission of liability or obligation to repair on the part, when the lease under which the tenant entered stipulated that he should do the repairing. (p. 219.)

Two actions to recover damages for personal injuries, one being by the wife and the other by her husband. The judge ordered a verdict in favor of the defendant, and the plaintiffs alleged exceptions.

James J. McCarthy and W. J. O'Donnell, for the plaintiffs.

J. Lowell and J. A. Lowell, for the defendant.

<sup>4</sup> **HAMMOND, J.** These were two actions of tort, the first to recover damages for personal injuries received as hereinafter described, and the second by the husband of the first named plaintiff to recover for loss of service, and for expenses incurred for medical attendance and nursing, of his wife. Since the right of the husband to recover must stand  
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fall with that of his wife, the discussion will be confined to her case, and the term "plaintiff" will be understood as applying simply to her.

The plaintiff, while at work as a servant in the employ of the Hammond, in a kitchen which was a part of premises let to him by the defendant, was injured by the fall of plastering from the ceiling. The building of which the premises hired by the Hammond were a part was owned entirely by the defendant. This part was upon the ground floor, and consisted of a dining-room fronting on the street, with a kitchen in the rear. A portion of the kitchen adjacent to the easterly wall of the building was covered with a composition roof which measured eight feet by twelve feet. Upon this roof a number of boards were laid and a clothes shed constructed, which was used by the other tenants of the building for drying clothes. This shed was uncovered, and above it was a light and air space extending to the roof of the main building. The shed and roof covering the kitchen were not a part of the premises let to the Hammond and were never used by him; and the only means of access to the roof was through a part of the building not let to him.

The lease under which Hammond held provided that he should "keep all and singular the said premises, in such repair, order and condition as the same are in at the commencement of the term, or may be put in during the continuance thereof."

The defendant introduced evidence tending to prove that the premises were in good condition at the time of the letting.

The plaintiff, being in the employ of Hammond, can have no better rights under the circumstances disclosed in this case than he had: *Roche v. Sawyer*, 176 Mass. 71, 57 N. E. 216; *Edan v. Sullivan*, 181 Mass. 348, 63 N. E. 909; *Phelan v. Fitzpatrick*, 188 Mass. 237, 108 Am. St. Rep. 469, 74 N. E. 326.

By the terms of the lease Hammond was under an obligation to keep in repair the ceiling, since it was a part of the kitchen; and the defendant owed to him no duty to repair the roof. The work done by the defendant is not shown to have been done in pursuance of any agreement to repair, and is not to be regarded as an admission of his liability or obligation to repair: *Phelan v. Fitzpatrick*, 188 Mass. 237, 108 Am. St. Rep. 469, 74 N. E. 326. It follows that the ruling of the trial court was right.

Exceptions overruled.

*The Liability to Third Persons of Lessors of real property is the subject of an extended note to Griffin v. Jackson Light etc. Co., 92 St. Rep. 499. It has recently been affirmed that a child whose parent occupy a leased tenement, and who is injured by defects therein, may not recover therefor if its parents could not have recovered if injured under the same circumstances: Phelan v. Fitzpatrick, 188 Mass. 237, 108 Am. St. Rep. 469.*

### CAVANAGH v. BLOCK.

[192 Mass. 63, 77 N. E. 1027.]

**PRIVATE WAYS, Who may Recover for Injuries Due to Nuisance upon.**—A woman passing over a private way to reach a house thereon occupied by her dressmaker has the same right as an abutter on such way to recover for injuries due to an accumulation of ice on the highway resulting from the manner in which another abutter has constructed and maintained his house so as to create a nuisance on such highway by the accumulation of ice thereon. (p. 221.)

**PRIVATE WAYS, Property Owners' Duties as to Ice and Snow.**—It is the duty of a lot owner not to erect a house so near a private way or to construct gutters to discharge the water that accumulates on his roof upon the way in such a manner as to make a dangerous accumulation of ice or water which will make the way unsafe for travel. (p. 221.)

**PRIVATE WAYS, Liability of Abutting Lot Owner for Accumulation of Ice.**—The owner of a house abutting on a private way which is not part of his premises by constructing and maintaining eaves, gutters, and conductors on such house in so improper and negligent a manner as to cause a dangerous accumulation of ice in front of his house on the part of the way fitted for travel is answerable to a person lawfully traveling on the way and exercising due care who is injured by his falling caused by the ice so accumulated. (p. 222.)

Action for tort for personal injuries. The trial judge ruled that the plaintiff could not recover and directed a verdict against the defendant, and the plaintiff alleged exceptions.

J. A. McGeough and W. J. Sullivan, for the plaintiff.

J. E. Young, for the defendant.

<sup>64</sup> KNOWLTON, C. J. The plaintiff was injured by falling upon an accumulation of ice on a walk at the side of a private way called Humboldt place. A block of eight tenement houses was built on one side of this way, close to the line of the sidewalk, along the front of the lots. The



defendant's house was No. 6, and, like the others, it occupied the entire front of the lot, which was twenty-one feet wide. It was a three-story wooden building, with a tar and gravel roof pitching slightly to the front and rear from the ridge-pole in the center. The eaves in front extended over the sidewalk about twenty-two inches from the wall of the house. A gutter was constructed under the eaves in front, with a conductor, which extended down from near the end of the gutter, on the side of the house, and emptied water on the sidewalk. The abutters constructed sidewalks in front of their respective premises, some of brick and others of plank. That in front of the defendant's house was of plank. All the abutters had a right in common to use the way, and the sidewalk was used by all abutters and others who had occasion to pass over the way.

The occupant of one of these houses was employed to do dressmaking for the plaintiff, and the plaintiff went to the house on this business. She was there by invitation, and was not a mere licensee, if that would make any difference in a case of this peculiar kind, which we do not decide. In passing along the way she stood in the place of an abutter, and in using the walk she was in the exercise of a legal right.

There was evidence for the jury on the question whether she was in the exercise of due care: *Shipley v. Proctor*, 177 Mass. 38, 59 N. E. 119; *Smith v. Lowell*, 6 Allen, 39; *Frost v. Walcott*, 12 Allen, 85; *McGuinness v. Worcester*, 160 Mass. 272, 41 N. E. 1068.

She was not upon the defendant's premises, and there is no evidence that he was under any legal obligation to keep the way in front of his house safe and convenient for the occupants of other houses, or for those using the way in their right, but it was his duty not to use his own property in such a manner as to create a nuisance on the way: *Watkins v. Goodrich*, 138 Mass. 533. It was his duty not to erect his house near the way, or to construct gutters or conductors to discharge the water that accumulated on his roof upon the way, in such a manner as to make a dangerous accumulation of ice in winter, which would make the way unsafe for travel.

There was evidence from which the jury might have found that the construction of the house and the gutter and conductor was improper and negligent, in reference to the defendant's duty not to create a nuisance upon property which be-

longed to others, for use in connection with their respective estates. The evidence tended to show that this conductor might be expected to accumulate, and did accumulate, in cold weather, a great irregular mass of ice in that part of the way which was designed and fitted for travel. That there is a liability on the part of the owner, to one injured from such a cause, has been decided in many cases: Kirby v. Boylston Market Assn., 14 Gray, 249, 74 Am. Dec. 682; Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 735; Shipley v. Fifty Associates, 101 Mass. 251, 3 Am. Rep. 346; Watkins v. Goodall, 138 Mass. 533; Smethurst v. Barton Square Church, 148 Mass. 261, 12 Am. St. Rep. 550, 19 N. E. 387, 2 L. R. A. 695. The liability does not depend upon an obligation to keep the way in good condition, but upon the duty of every land owner not to accumulate water on his premises and discharge it from a spout or channel upon neighboring property to the injury of those rightfully using that property. The principle is very similar to that which is the ground of the decision in Corrigan v. Union Sugar Refinery, 98 Mass. 577, 96 Am. Dec. 685. Cases like Moffatt v. Kenny, 174 Mass. 311, 54 N. E. 850, where the injury happened to the plaintiff while on the defendant's property, have no application to this action.

The defendant testified that, if there was any occasion to repair the roof or look after the conductor or gutter, his agent would employ a man to do it, and the defendant would pay the bill. He also said that he made all repairs, and once every year before the cold weather he employed a man to clean out the gutters. The jury well might find that the defendant, and not <sup>66</sup> the tenant, was responsible for the construction and condition of the roof, gutter and conductor. The defendant was not relieved from his duty to keep the premises in such a condition as not to create a nuisance by a covenant of the tenant, as in Wixon v. Bruce, 187 Mass. 232, 72 N. E. 978, 68 L. R. A. 248.

We are of opinion that the case should have been submitted to the jury.

Exceptions sustained.

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*The Liability of Owners or Occupants of property abutting on a street or highway for so maintaining the buildings or premises as to cause the accumulation of snow and ice on the highway to the injury of persons traveling thereon, is considered in Leahan v. Cochran, 178 Mass. 566, 86 Am. St. Rep. 506, and note; note to Griffin v. Jackson*

Light etc. Co., 92 Am. St. Rep. 538; Smethurst v. Congregational Church, 148 Mass. 261, 12 Am. St. Rep. 550; New Castle v. Kurtz, 210 Pa. 183, 105 Am. St. Rep. 798.

*The Rights and Obligations of Parties to Private Ways* are discussed in the note to Dudgeon v. Bronson, 95 Am. St. Rep. 318.

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### PITTS v. MILTON.

[192 Mass. 88, 77 N. E. 1028.]

**TRUST, When not Created by a Devise to the Testator's Wife for the Purpose of Maintaining Herself and Their Children.**—A devise and bequest to the testator's wife of his real and personal estate "for the purpose of maintaining herself and our children, to her and her heirs forever," creates an estate in fee in her when she becomes his widow and no trust in favor of the children. (p. 224.)

Bill in equity to establish a trust claimed to exist under the will of Coffin Pitts, defendants claiming under a conveyance from his widow, and the complainants that, by his will, Pitts created a trust in favor of his children. The trial court dismissed the bill, and the complainants appealed.

E. F. Leonard and C. C. Pitts, for the plaintiff.

W. H. White and M. L. Lourie, for the defendants.

<sup>88</sup> **BRALEY, J.** In the will of Coffin Pitts this provision is found: "I give and bequeath to my beloved wife Louisa E. Pitts all my real and personal estate wherever situated of which I may die <sup>89</sup> possessed for the purpose of maintaining herself and our children to her and her heirs forever," and if by the language used the testator's widow, under whom the defendants derive title, took a fee, the plaintiff at the time of bringing suit had no legal or equitable interest to the land described in this bill. At the testator's death his widow and two minor children survived, one of whom was the plaintiff, and as no express trust in favor of either is technically described, if an equitable estate for the benefit of the children was created, it must be found in the words "for the purpose of maintaining herself and our children."

When disposing of his estate he gave all to his wife, and used words of inheritance sufficient to pass a fee in the real property unaided by the provisions of General Statutes, chap-

ter 92, section 5, which were in force at his death and when the will was admitted to probate: *Smith v. Rice*, 183 Mo. 251, 66 N. E. 806. It is a rule of construction that ordinarily when a fee is devised the estate of the devisee is cut down by subsequent language of doubtful import found in other clauses, or in a codicil, but which does not expressly qualify or limit the first devise: *Damrell v. Hartt*, 137 Mass. 218; *Bassett v. Nickerson*, 184 Mass. 169, 68 N. E. 25. The intention of the testator when ascertained must control, and for this purpose the entire clause, which is the only portion of the will appearing in the record, must be considered: *Dana v. Dana*, 185 Mass. 156, 70 N. E. 49. In stating his general purpose if the qualifying words used had followed instead of preceded the words of inheritance they would not have operated to create a trust for the benefit of the children, as she already had been given an absolute estate, and they have no greater significance or meaning because interpolated before, rather than placed at the end of the sentence. It must be held, therefore, that the widow of the testator, upon probate of the will, became seised in fee of all his real estate: *Spooner v. Lovejoy*, 108 Mass. 529; *Aldrich v. Aldrich*, 172 Mass. 101, 51 N. E. 449.

Under this construction the contention of the plaintiff that the reconveyance by his sister and himself to his mother, when after they had obtained their majority, conveyed this real estate to them, was for the purpose of again clothing her with the legal title while the equitable title remained in the children, ceases to be material. If a trust did not exist under the terms of the will <sup>so</sup> none was created by the deed of reconveyance, and she again took an unqualified fee, which by the mesne conveyances is now vested in the defendant, Appleton. A consideration, therefore, of the other defenses is not required.

Decree affirmed.

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*A Devise of a Fee* may be restricted by subsequent words in the will and changed to an estate for life: *Hill v. Gianelli*, 221 Ill. 286, 100 Am. St. Rep. 286. However, when the words of a will at the outset clearly indicate a disposition to give the entire estate absolutely to the first donee, the fee will not be cut down to a less estate by subsequent or ambiguous words inferential in their intent: *Gannon v. Albright*, 183 Mo. 238, 105 Am. St. Rep. 471.

## LOWE v. JONES.

[192 Mass. 94, 78 N. E. 402.]

**TRUST Against Assets in the Hands of an Administrator, When may be Established.**—If the proceeds of trust property can be traced into a particular fund, the trust may be established and enforced as a charge upon the fund. (p. 226.)

**TRUST Against Proceeds of Trust Property, When cannot be Established.**—A trust cannot be established against the proceeds of trust property which has been disposed of unless the proceeds can be identified and traced into some particular fund or property. (p. 227.)

**TRUST Against General Assets in the Hands of an Administrator When cannot be Established.**—A trust cannot be established against the proceeds of trust property wrongfully disposed of by the trustee on the ground that the proceeds of the trust property went into the general assets and thereby increased the amount in the hands of the administrator. (p. 229.)

**TRUST, Administrator of Deceased Trustee, When cannot be Compelled to Apply General Assets to Relieve Trust Property.**—If a trustee has wrongfully pledged trust property under such circumstances that it cannot be recovered from the pledgee, the administrator of the trustee cannot be compelled to use the general assets of the estate to exonerate such property from the liability for which it was pledged. (pp. 229, 230.)

Bill in equity against the Neponset National Bank of Canton and the administrator of the estate of Clarence M. Merriam, alleging that the deceased held certain stocks as trustee for the plaintiff, and while so holding, pledged them without authority to the defendant bank; that the estate of the decedent is represented to be insolvent, but that the assets of the estate are sufficient to enable the defendant administrator to pay all the indebtedness due to the bank. The bill prayed that the administrator be directed to redeem the stock and to deliver such stock to the plaintiff. The defendant administrator having demurred, the demurrer was overruled, and the case was reported for the determination of the supreme judicial court.

H. W. Dunn and C. H. Gilmore, for the defendant Jones.

H. E. Warner, for the plaintiff.

<sup>90</sup> **KNOWLTON, C. J.** The defendant's intestate, one Merriam, held stock of the plaintiff under an arrangement which established a relation of trust between the parties, and made it his duty to continue to hold it until the conditions should change. It is averred in the bill that he sold a part

of it and received the process as his own, and pledged remainder of it to the defendant bank as security for a loan made to him personally. On the facts averred there is nothing to show that the bank did not take the pledged property in good faith, under such circumstances as would enable it to hold it as security for the loan. Indeed, this part of the stock, with Merriam's note which it was pledged to secure, has been taken up by the plaintiff under a stipulation that the redemption should be without prejudice to the rights of any of the parties. There is no doubt of the plaintiff's right to hold this part of the stock as trust property except as to the claim of the bank under its loan. Would it not for the bank's claim he could redeem it from the defendant, in accordance with the arrangement under which it was originally held. <sup>100</sup> The present contention as to the stock relates only to that part of its value which is represented by the loan. As to that part the rights of the parties are substantially the same as they are in regard to other stock which Merriam sold in violation of his trust.

The plaintiff avers that Merriam's estate has been represented insolvent, and he seeks to establish a trust against the general assets of the intestate in the hands of the administrator, in such a way as to obtain the full value of the stock to the corresponding diminution of the amount to be divided among the creditors. All the stock that was sold and the interest of the bank in that which was pledged have gone into the hands of holders in good faith for a valuable consideration. The plaintiff, therefore, cannot obtain it in specie. His only right, if he has any beyond that of the general creditors, is to follow the money received on account of it, and establish his trust against that.

The rule stated in some of the early cases that a trust could not be enforced against money mingled with other money in a common fund, because money has no earmarks, has been relaxed, and it is now held that if the proceeds of trust property can be traced into a particular fund, the trust may be established and enforced as a charge upon the fund. This principle has often been recognized both in England and America. A leading case on this subject is *In re Halle's Estate*, 13 Ch. D. 696. The opinions in this case have sometimes been understood as carrying the law further in the direction of following proceeds to enforce a trust than it

actually carried. As a consequence, there have been decisions in some of the American states to the effect that, if one's general estate has been enriched by the proceeds of trust property, the trust may be established against the general assets even though the estate is insolvent: See *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214; *Davenport Plow Co. v. Lamp*, 80 Iowa, 722, 20 Am. St. Rep. 422, 45 N. W. 1049; *Myers v. Board of Education*, 51 Kan. 87, 37 Am. St. Rep. 263, 32 Pac. 658; *Carley v. Graves*, 85 Mich. 483, 24 Am. St. Rep. 99, 48 N. W. 569. But these cases have all been either expressly overruled or greatly limited and qualified: *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383; *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 96; *Bradley v. Chesebrough*, 111 Iowa, 126, 82 N. W. 472; *Marquette Fire Commrs. v. Wilkinson*, 119 Mich. 655, 78 N. W. 993, 44 L. R. A. 493; *Travelers' Ins. Co. v. Caldwell*, 59 Kan. 156, 52 Pac. 440; *Kansas State Bank v. First State* <sup>101</sup> Bank, 62 Kan. 788, 64 Pac. 634. In some states it is held that, while it is not enough to show that trust property went into the general assets, it is enough to charge the whole estate with a trust, if it can be shown that the proceeds remain unexpended somewhere in the estate: See *Slater v. Oriental Mills*, 18 R. I. 352, 27 Atl. 443; *Bradley v. Chesebrough*, 111 Iowa, 126, 82 N. W. 472; *Hopkins v. Burr*, 24 Colo. 502, 65 Am. St. Rep. 238, 52 Pac. 670; *Pearson v. Haydel*, 90 Mo. App. 253; *Lincoln v. Morrison*, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885. But by the great weight of authority, a trust cannot be established against the proceeds of trust property which has been disposed of, unless the proceeds can be identified and traced into some specific fund or property. This is the doctrine of *In re Hallett's Estate*, 13 Ch. D. 696, to which we have already referred. In the latter case of *In re Hallett*, [1894] 2 Q. B. 237, it was said in the opinion: "There is nothing in our decision in the present case which is in conflict with the decision in *Re Hallett's Estate*. In order to follow trust money, there must be specific property capable of being identified, into which the money has been converted, and in that case this doctrine was applied in this way; it was said that, where a trustee pays his own money and also trust money into his banking account, it is the same thing as though he had placed them in a box, and his drawing for his own purposes must be

assumed to be out of his own money. That decision in way qualifies the rule that there must be a specific thing capable of being followed": See, also, *In re Stenning*, [1892] 2 Ch. 433; *In re Oatway*, [1903] 2 Ch. 356. The rule in Massachusetts has always been held, with considerable strictness, to require the identification of the trust property passing into some other specific property or fund, as distinguished from the general assets of one's estate: *Howard v. Fay*, 138 Mass. 104; *Attorney General v. Brigham*, 142 Mass. 248, 7 N. E. 851. In *Little v. Chadwick*, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570, this court said: "When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as passing into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the cestui que trust to follow it fails. . . . There is nothing to the contrary in *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. ed. 693, and in *Re Hallett's Estate*, 13 Ch. D. 102 696, which are chiefly relied on by the annuitants. In Wisconsin a majority of the court has declared that it is not necessary to trace the trust fund into any specific property in order to enforce the trust; and that if it can be traced into the estate of the defaulting agent or trustee, this is sufficient: *McLeod v. Evans*, 66 Vt. 401, 57 Am. Rep. 287, 28 N. W. 173, 214. But this seems to us to be stated too broadly." We have already seen that this case in Wisconsin has been overruled.

The great weight of authority both in England and America is in accordance with the rule in *Little v. Chadwick*, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570: *Lebanon Bank v. Assigned Estate*, 166 Pa. 622, 31 Atl. 334; *Marquette Bank v. Commrs. v. Wilkinson*, 119 Mich. 655, 78 N. W. 993, 44 L. R. A. 493; *Hauk v. Van Ingen*, 196 Ill. 20, 63 N. E. 705; *Ellis v. Kuhl*, 15 Dick. 333, 46 Atl. 945; *Ober v. Cochran*, 118 Me. 396, 98 Am. St. Rep. 118, 45 S. E. 382; *In re Mulligan*, 100 Fed. 715; *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 175; *Northern Dakota Elevator Co. v. Clark*, 3 N. D. 26, 53 N. W. 175; *Cushman v. Goodwin*, 95 Me. 353, 50 Atl. 50; *Rockwell v. School Dist.*, 70 N. H. 388, 47 Atl. 704; *Peters v. Board*, 133 U. S. 670, 10 Sup. Ct. Rep. 354, 33 L. ed. 696; *Freligh v. huysen v. Nugent*, 36 Fed. 229; *Holmes v. Gilman*, 138 N.



369; *In re Hicks*, 170 N. Y. 195, 63 N. E. 276, and English cases above cited.

All that is averred in the present case is that the proceeds "were received by said Merriam and form a part of the assets of his estate now in the hands of said respondent Jones." This is equivalent to a statement that the proceeds in the form of money came into the hands of Merriam, and cannot be traced further, although the plaintiff avers that they were not paid out, but went to increase the assets of the estate.

Where money is received and mingled with one's general property by the holder, and used as his own, there would be great difficulty, in most cases, in showing that none of it was expended or used to pay debts, if it were held for any considerable time. Moreover, if it is impossible to trace the money into any fund or investment, and it becomes part of the general assets of the holder, which assets perhaps have changed their form in a variety of ways after the receipt of the money, it would be impossible to enforce a trust, unless it were established against every variety of property belonging to the holder, including debts, choses in action, and other things which it is not easy to <sup>103</sup> make the subject of a trust. In the settlement of an insolvent estate there would be little equity in preferring this kind of claim, as against other creditors, some of whose claims might be quite as meritorious, and founded on as great a violation of private rights as that of the *cestui que trust*. Except in cases of the insolvency of the trustee, the right to establish a trust against his estate is of no consequence, for all that could be obtained in such a case would be the value of the trust property, or its proceeds, and that can always be collected of the trustee if he is solvent. For different reasons we think the rule stated in *Little v. Chadwick*, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570, should be followed, and that a trust should not be declared against the insolvent estate of a deceased person on the ground that the proceeds of trust property went into the general assets, and thereby increased the amount in the hands of the administrator.

The contention of the plaintiff that the administrator should be compelled to use the general assets of the estate to exonerate the stock in the possession of the bank from its liability for the bank's debt is simply another way of urging that the general assets of the intestate are impressed with

a trust, to the amount of the loan received by the intestate. Unless they are so impressed they cannot be taken from the general creditors and used for the redemption of the trust property in the hands of the bank. The case of *Ex parte Alston*, L. R. 4 Ch. 168, has no application to this contention. That was a case of marshaling assets which had been pledged for a debt of the bankrupt. The pledge included trust property and other property of the bankrupt. It was decided that the other property held in pledge must all be applied to the payment of the debt, to the exoneration of the trust property. In the present case the only property pledged was trust property, and there is no opportunity to marshal assets in the payment of the debt from the proceeds of the pledged property.

Bill dismissed, without prejudice to the right of the plaintiff to prove his claim against the estate.

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*The Right to Follow Trust Funds* when they have been misapplied by the trustee is discussed in the notes to *Ferchen v. Arndt*, 46 Am. St. Rep. 608; *Union Nat. Bank v. Goetz*, 32 Am. St. Rep. 125. To recover a trust fund which has been misapplied by the trustee, it must be clearly identified or distinctly traced into the property, fund, or chose which is to be made subject to replace it; when it has been dissipated and can be traced no further than into the hands of the trustee, it is lost, and he who was its owner stands upon no better footing than a general creditor, when the assets of the trustee are being distributed by a court of equity: *Ober v. Cochran*, 118 Ga. 398, 98 Am. St. Rep. 118. For other recent decisions on this question, see *Boyle v. Northwestern Nat. Bank*, 125 Wis. 498, 110 Am. St. Rep. 84; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 60; *State v. Foster*, 5 Wyo. 199, 63 Am. St. Rep. 47.

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## FRANCIS v. HAZLETT.

[192 Mass. 137, 78 N. E. 405.]

**JUDGMENT** Against Insolvent Corporation; When Binding Upon Stockholders Though Entered in a State of Which They are not Residents.—A decree entered in another state against a corporation appointing a receiver therefor and finding that such corporation insolvent and without property, and adjudicating and putting in judgment against it claims of specified amounts, and authorizing such receiver to bring suits against the stockholders, there being no contention that the court did not have jurisdiction of the subject-matter of the suit and of the parties thereto, including such corporation, is conclusive on its stockholders when suit is brought to enforce their liability in another state respecting their liability. Persons b

coming stockholders of a corporation are bound by the provisions of the statute of the state wherein the corporation was formed existing at the time of the acquisition of their shares, and who must be regarded as within the jurisdiction of the local courts of the state, so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. (pp. 233, 234.)

**CORPORATIONS, Jurisdiction of Court in Proceedings Against Depends on Its Finding and cannot be Overthrown by Disproving Such Finding.**—In proceedings in a state court against a corporation, a finding that the assets of such corporation are wholly exhausted is conclusive in favor of the jurisdiction of such court, and a decree dependent on such finding cannot be avoided on the ground that assets in fact existed. (p. 234.)

**EQUITY PRACTICE, Cross-bill, When not Sustainable.**—In a suit by the stockholders of a foreign corporation against its receiver appointed in another state to restrain him from prosecuting actions at law against complainants to enforce their liability as stockholders, the defendant cannot by cross-bill enforce the liability of the plaintiffs, where he has already commenced suits at law to enforce such liability, and the remedy at law to which he thus resorted does not appear to be inadequate. (p. 235.)

Suit in equity against Alfred Hazlett, as receiver of the insolvent corporation, the American Bank of Beatrice, Nebraska, to restrain him from prosecuting certain actions at law pending in the superior court of Massachusetts against them as stockholders of such corporation. A demurrer to the bill interposed by the defendant was overruled, and he appealed. The defendant having filed an answer, also by leave of the court, filed a cross-bill to enforce the plaintiff's alleged liability. On motion, this cross-bill was dismissed, and the defendant appealed. It was finally determined by the trial court that the complainant's bill could not be sustained, and it was dismissed, and they appealed.

W. Keyes, for the plaintiffs.

R. H. Bailey and E. B. Church, for the defendant.

<sup>140</sup> **SHELDON, J.** The principal question raised is whether the plaintiffs are bound by the proceedings had in the district court of Gage county, Nebraska, on March 5, 1895, in which the defendant was appointed receiver of the American Bank of Beatrice in that county, and by the interlocutory decree entered in June, 1898, by which the court, having found that the assets of the bank had all been disposed of, and the proceeds paid out and applied by the receiver in pursuance of the order of court, that there had been adjudicated and put in judgment claims against the bank to the

amount of \$32,795.08 and accruing interest and costs, and that the bank was wholly insolvent and had no property of any kind out of which to make the amounts due to its creditors, authorized and instructed the receiver to bring suits against the several stockholders of the bank. The importance of this question arises from the fact that, as is agreed by both parties, under the constitution and laws of Nebraska by which the substantive rights of the parties are governed, the liability<sup>141</sup> of the stockholders for the payment of the debts of the bank is merely secondary, and can be enforced in suits brought by the receivers only after the amount of the debts has been judicially ascertained and other corporate property exhausted: *Farmers' Loan etc. Co. v. Funk*, 49 Neb. 353, 68 N. W. 520; *State v. German Sav. Bank*, 50 Neb. 770 N. W. 221; *Hastings v. Barnd*, 55 Neb. 93, 75 N. W. 353. The plaintiffs contended before the master, and offered to show, that the conditions precedent to any right of action against them had not in fact been complied with.

There is no contention that any of these plaintiffs were directly made parties to the suit in the district court of Nebraska in which the proceedings in question were taken. If the corporation, the American Bank of Beatrice, had been a party to that suit, undoubtedly the present plaintiffs would not have been bound by any action taken therein. That was assumed in *Clark v. Knowles*, 187 Mass. 35, 105 Am. St. Rep. 376, 72 N. E. 352, and *Hancock Nat. Bank v. Ellis*, 187 Mass. 39, 70 Am. St. Rep. 232, 51 N. E. 207, 42 L. R. A. 353. They would be neither party nor privy to such a suit; having no notice of its inception and no duty to make any contribution to it, they would be mere strangers to it, and no rights of theirs could be affected by any findings or adjudication made therein: *Eayrs v. Nason*, 54 Neb. 143, 74 N. W. 408. Even if there is no dispute that the plaintiffs were stockholders of this bank; and the decrees which we are considering were made in a suit brought directly against the bank, alleging its insolvency and asking for the appointment of a receiver, and no question is made but that the bank was properly served with process and appeared, or that the court in which the suit was brought had full jurisdiction both of the subject matter of the suit and of the parties thereto. Under such circumstances, it is well settled that the stockholders of the bank are bound by the proceedings taken in the suit: *Hambleton*

Glenn, 72 Md. 331, 20 Atl. 115; Parker v. Stoughton Mill Co., 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751. The decrees entered in the Nebraska court and the findings made and stated therein are conclusive in that state against both the corporation and the stockholders, and must have the like force and effect when their enforcement is sought in our courts: Hancock Nat. Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. Rep. 506, 44 L. ed. 619. The plaintiffs were bound by the provisions and laws of the state of Nebraska which entered into the contract by which they acquired their shares; they have assented to this <sup>142</sup> obligation by receiving their stock, and have subjected their rights to that extent to the jurisdiction of the Nebraska courts, and are sufficiently represented by the corporation in proceedings before those courts: Tompkins v. Blakey, 70 N. H. 584, 49 Atl. 111; Childs v. Cleaves, 95 Me. 498; Andrews v. Steele City Bank, 57 Neb. 173, 77 N. W. 342; Richards v. People, 81 Ill. 551.

It is not necessary, however, to multiply citations for the support of these propositions. They have been settled in this commonwealth by the decision in Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301. In the carefully reasoned opinion by Mr. Justice Knowlton in that case it is said: "The question arises, how far these proceedings in the court of Washington are binding on the defendant. The stockholders must be assumed to have understood the statute from the first as it has been construed by the court. They must be presumed to have agreed that on the insolvency of the corporation a receiver might be appointed by the court, and the affairs of the corporation administered, and the amount of its assets and liabilities determined, and the deficiency ascertained under the order of the court, and an assessment to meet this deficiency made ratably upon all who were then stockholders. This is the only proper way of accomplishing the object of the statute, and the statute, as construed by the local courts, means this as plainly as if every part were expressed. Under the statute the stockholders impliedly agreed that if their subscriptions were in part unpaid when they were needed for creditors, they would pay the balance to the corporation or its legal representative, and that if more was needed they would also pay their proper share, up to the amount of their subscriptions, to the trustee of this additional fund, for the benefit of creditors. The determination

of the questions involved is a part of the proceedings of court in the administration of the affairs of a local insolvent corporation. The court of Washington, acting under its general authority in such administration, is the only tribunal which has jurisdiction to determine the amounts due creditors, and to collect and apply the assets of the corporation. The undertaking of the stockholders relates directly to payment of amounts, so to be ascertained. The ascertainment is like a common case of a judgment against a corporation which is binding on stockholders. The members of such corporations, as well as the corporations <sup>143</sup> themselves, within the jurisdiction of the local court so far as is necessary for the determination of the rights and liabilities of corporation and its members among themselves. In reference to this kind of liability such decisions and orders binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation. And see the cases cited in that opinion. Although the plaintiffs were not parties to the Nebraska suit, yet they were bound by the orders which are here in question: *Howarth v. Ellwanger*, 86 Fed. 54, quoted in *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301.

The cases relied upon by the plaintiffs to support their contention that they are not bound by these orders made by the Nebraska court in the suit there pending against the bank contain nothing at variance with what has been said, and need not be particularly considered. The argument of their counsel rests upon the fallacy that the court had no jurisdiction over the subject matter of these decrees unless the assets of the bank were in fact absolutely exhausted. The correct position is that the court had not the right to enter these decrees until it had found the necessary facts, including exhaustion of the corporate assets. It had jurisdiction to determine this question; and its determination thereof is conclusive in the state of Nebraska: *Brinkworth v. Hazlett*, Neb. 592, 90 N. W. 537; *Andrews v. Steele City Bank*, 57 Neb. 173, 77 N. W. 342; *State v. German Sav. Bank*, 59 Neb. 280 N. W. 901; *Stenberg v. State*, 48 Neb. 299, 67 N. W. 15; *Smithson v. Smithson*, 37 Neb. 535, 40 Am. St. Rep. 556 N. W. 300. That it must be given like force and effect here under the constitution of the United States, article I, section 1, is settled by the decisions already cited.

It follows from what has been stated that none of the plaintiffs' exceptions to the master's report can be sustained, and that the defendant's fourth exception at least must be sustained. It necessarily follows also that the plaintiffs' bill cannot be maintained. It is unnecessary, accordingly, to consider the defendant's demurrer to the bill; and the only question which remains to be disposed of is that which arises upon the defendant's appeal from the decree dismissing his cross-bill.

It may be granted, as the defendant contends, that "a cross-bill for relief is proper in cases where, in the original suit, all things in litigation touching the subject matter cannot be brought <sup>144</sup> before the court, but the defendant, in order to obtain a complete settlement of the controversy, is entitled to some relief which the scope of the plaintiff's bill will not afford him": Morton, J., in *Richards v. Todd*, 127 Mass. 167. Nor is it necessary that a cross-bill should show any independent right to equitable relief, if it really involves a part of the subject matter of the original bill: *North British & Mercantile Ins. Co. v. Lathrop*, 70 Fed. 429, 17 C. C. A. 175; *Springfield Mill. Co. v. Barnard & Leas Mfg. Co.*, 81 Fed. 261, 26 C. C. A. 389. But the subject matter of this bill is not strictly the question whether the plaintiffs are respectively liable to pay assessments upon the stock for the benefit of creditors of the corporation; it is rather whether the conditions precedent to the defendant's right to enforce his claim that they are thus liable have been performed. Moreover, it appears that some time before the filing of the bill the defendant had brought actions at law against the respective plaintiffs for the recovery of the amounts for which he claims that they are severally liable; and it is only a several liability against each one of them that he seeks to enforce. In our opinion, he has no legal right in such a case to enforce his claims by a cross-bill, but should be left to the remedy at law to which he first elected to resort.

The result is that each of the decrees appealed from must be affirmed, and that the plaintiffs' bill must be dismissed; and it is so ordered.

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*A Bill in Equity to Enforce the Personal Liability of Stockholders in a corporation on a claim not reduced to judgment cannot ordinarily be maintained beyond the state where it was organized: Clark v. Knowles*, 187 Mass. 35, 105 Am. St. Rep. 376. And where the obligation of a stockholder is secondary to that of the corporation and

proportionable to that of other stockholders, it will not be enforced in other states, unless the equities between all stockholders and a creditors can be administered: *Miller v. Smith*, 26 B. I. 146, 106 Am. St. Rep. 699. The liability of stockholders in a foreign corporation cannot be enforced in a state other than the state of incorporation by a suit in equity in which part only of the creditors are made parties plaintiff and only one stockholder is made party defendant. To maintain such a suit, it must be in behalf of all the creditors against all the stockholders, and the corporation itself must be made a party: *Bates v. Day*, 198 Pa. 513, 82 Am. St. Rep. 811.

### FITZMAURICE v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

[192 Mass. 159, 78 N. E. 418.]

**CARRIERS OF PASSENGERS Have the Right to establish reduced rates for students under a fixed age.** (p. 237.)

**CARRIERS OF PASSENGERS, Liability of to Persons Riding on a Ticket Obtained at Reduced Rates by Misrepresentation.**—One who obtains a ticket at reduced rates by falsely representing herself to be under eighteen years of age and to be a pupil in an art school and who, by virtue of such ticket, goes upon a railway train, is a mere trespasser, and is barred by her false conduct from recovering for injuries sustained by her, and for which she would have a right to recover if a passenger. (pp. 237, 238.)

**CARRIERS OF PASSENGERS, Effect of Accepting Coupons on Ticket Obtained by Misrepresentation.**—If one obtains a ticket at reduced rate by knowingly and falsely representing herself to belong to a class entitled to tickets at such rate, the acceptance of coupons on such ticket by conductors who do not know the circumstances under which it was obtained should not establish acquiescence in the wrongful purchase, nor entitle the holder of the ticket to recover for injuries sustained on the train under circumstances which would entitle a passenger to recover. (p. 238.)

J. J. Shaughnessy, for the plaintiff.

J. L. Hall, for the defendant.

<sup>159</sup> SHELTON, J. The plaintiff, while riding upon a train of the defendant, was injured by reason of a collision and no question is made but that she would have been entitled to a verdict in her favor if she had the rights of a passenger. She was a minor. She was riding upon a three months' season ticket which was good only for students under eighteen years of age. She had obtained this ticket by presenting to the defendant's ticket agent a certificate purporting to be signed by <sup>160</sup> her father that she was under eighteen years



of age and was a pupil in the Hollander Art School, Boston, and agreeing that she would not use the ticket otherwise than in going to and from the school; and also presenting a certificate purporting to be signed by "J. F. Miner, Principal, Hollander Art School, Boylston St., Boston, Mass.," that she was a pupil in his school, and as he fully believed intended to remain so for the next three months. She was at this time over eighteen years of age, as she testified, lived in Marlborough, and was employed in Hollander's drygoods store in Boston. The regular price for a season ticket was thirty-two dollars; the reduced rate for students under eighteen years of age, at which the plaintiff procured it, was sixteen dollars. She had been riding upon this ticket nearly every day except Sunday for over a month, and the coupons had been received by the conductor. Upon the face of the ticket were the words, "Good only for a person under eighteen years of age." The jury having found the amount of the plaintiff's damages if she was entitled to recover, the judge ordered a verdict for the defendant, and reported the case to this court, with the stipulation that if she is entitled to recover, judgment is to be entered in her favor for that amount; otherwise, there is to be judgment on the verdict.

The defendant had the right to establish a reduced rate for students under a fixed age: Rev. Laws, c. 111, sec. 228. A statute requiring similar action by street railway companies was sustained by this court in a recent case: *Commonwealth v. Interstate Consolidated St. Ry.*, 187 Mass. 436, 73 N. E. 530. The plaintiff knew that she did not come within the class to which this offer of a reduced rate was made, and obtained her ticket by presenting certificates of facts which she knew to be false. She thus obtained by false representations a ticket to which she knew that she was not entitled. Whatever rights she had to be regarded as a passenger on the defendant's train she had acquired solely by the fraud which she had practiced upon the defendant. She had no right to profit by her fraud; she had no right to rely upon the consent of the railroad company to her entering its train as a passenger, when she had obtained that consent merely by gross misrepresentations. Accordingly, she was not lawfully upon the defendant's train; she was in no better position than <sup>161</sup> that of a mere trespasser. This principle has been affirmed in other jurisdictions. Thus it has been held that a

person traveling over a railroad on a free pass or a mileage ticket which had been issued to another by name and was not transferable, was barred by his fraudulent conduct from recovering for a personal injury unless it was due to negligence so gross as to show a willful injury: Toledo etc. Ry. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Way v. Chicago etc. Ry., 64 Iowa, 48, 52 Am. Rep. 431, 19 N. W. 828. If the plaintiff had fraudulently evaded the payment of any fare, she certainly would not have become a passenger, and the defendant's utmost duty to her while she was upon its train would have been to abstain from doing her any willful or reckless injury: Condran v. Chicago etc. Ry., 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749; Toledo etc. Ry. v. Brookfield, 81 Ill. 245; Chicago etc. R. R. v. Mehlsack, 131 Ill. 61, 19 Am. St. Rep. 17, 22 N. E. 812. But such a case cannot be distinguished in principle from the case at bar, in which the plaintiff obtained her ticket at a reduced price by successfully practicing a fraud. The only relation which existed between the plaintiff and the defendant was induced by her fraud, and, as was said by the court in Way v. Chicago etc. Ry., 64 Iowa, 48, 52 Am. Rep. 431, 19 N. W. 828, she cannot be allowed to set up that relation against the defendant as a bar to recovery: See, also, to the same effect, Godfrey v. Ohio etc. Ry., 116 Ind. 30, 18 N. E. 61; McVeety v. St. Paul etc. Ry., 45 Minn. 268, 22 Am. St. Rep. 728, 47 N. W. 809, 11 L. R. A. 174; McNeill v. Durham etc. R. R., 31 Am. & Eng. R. R. Cas., N. S., 285.

Nor is the plaintiff helped by the fact that the defendant's conductors had accepted the coupons of her ticket. The plaintiff simply showed that she had succeeded in carrying her scheme to completion. There had been a similar acceptance by the conductor in Way v. Chicago etc. Ry., 64 Iowa, 48, 52 Am. Rep. 431, 19 N. W. 828, and Toledo etc. Ry. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613. If the defendant's conductors did not know the real facts, their acceptance of her coupons could have no effect; if they knew the facts and acquiesced in the plaintiff's wrongful purpose, this conduct could give her no additional rights: McVeety v. St. Paul etc. Ry., 45 Minn. 268, 22 Am. St. Rep. 728, 47 N. W. 809, 11 L. R. A. 174, and Condran v. Chicago etc. Ry., 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749.

<sup>162</sup> The cases relied on by the plaintiff do not support her contention. In *Galveston etc. Ry. v. Snead*, 4 Tex. Civ. App. 31, 23 S. W. 277, *Ohio etc. R. R. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336, and *Austin v. Great Western Ry.*, L. R. 2 Q. B. 442, no question of fraud was involved. The same is true of *Foulkes v. Metropolitan District Ry.*, 4 C. P. D. 267, and 5 C. P. D. 157. In *Doran v. East River Ferry*, 3 Lans. 105, the plaintiff was allowed to recover on the ground that the defendant's servants had negligently failed to demand her fare, and that her injury was due to gross negligence. We have found no decision which would support a recovery under circumstances like those before us.

The plaintiff's counsel very properly has not contended that there was evidence of any such wanton or reckless conduct as to entitle her to recover in spite of her rights being only those of a trespasser: *Bjornquist v. Boston etc. R. R.*, 185 Mass. 130, 102 Am. St. Rep. 332, 70 N. E. 53; *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594.

According to the terms of the report there must be judgment on the verdict.

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*Who are Passengers* is the subject of a note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 75. Everyone riding in a railroad car is presumed to be there lawfully as a passenger: *Anderson v. Missouri Pac. Ry. Co.*, 196 Mo. 442, 113 Am. St. Rep. 748. One who pays a brakeman for the privilege of riding, and is told to get on the platform of the baggage-car and to get off at stopping-places for the purpose of keeping out of sight, is not a passenger: *Mendenhall v. Atchison etc. Ry. Co.*, 66 Kan. 438, 97 Am. St. Rep. 380. See, too, *O'Donnell v. Kansas City etc. R. R. Co.*, 197 Mo. 110, 114 Am. St. Rep. 753. And it seems that a person riding on a nontransferable pass or ticket issued to another is not a passenger: *Toledo etc. Ry. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Way v. Chicago etc. R. R. Co.*, 64 Iowa, 48, 52 Am. Rep. 431.

*Toward Trespassers on Its Trains* a railroad company ordinarily owes no duty further than to refrain from willful or wanton negligence: *Mendenhall v. Atchison etc. Ry. Co.*, 66 Kan. 438, 97 Am. St. Rep. 380; *O'Donnell v. Kansas City etc. R. R. Co.*, 197 Mo. 110, 114 Am. St. Rep. 753.

S——— v. S———.

[192 Mass. 194, 77 N. E. 1025.]

**DIVORCE, Impotency, When may Coexist With the Possibility of Sexual Intercourse.**—A husband is entitled to a divorce from his wife on the ground of her impotency, though they have had complete sexual intercourse on more than one occasion, if, owing to peculiarities in the sexual organs of each, such intercourse always was and always must be, attended with pain on her part so severe that they, on the advice of a physician, separated and have since lived apart, though such peculiarities would not interpose any difficulty in either having such intercourse with any other person of the opposite sex. (p. 241.)

Libel for divorce by a husband on the ground of the impotency of his wife. The trial judge reported the case for the determination of the supreme judicial court. His report was as follows:

“The libellant testified that he and the libelee were married in Boston on November 24, 1897; that immediately after the marriage the libelee was unable to perform the marriage function. At the hearing it appeared that any attempt at sexual intercourse between the parties caused the respondent severe pain, resulting in a serious nervous condition, accompanied by severe headaches which continued usually a whole day; that at one time during attempted connection she fainted, and she invariably cried out and exclaimed with pain at each attempted connection. This condition of suffering and extreme nervousness continually increased until the mere mention of the subject became unbearable to her. Medical advice was taken, and acting upon such advice they ceased to attempt sexual intercourse for several months, but on resuming connection the same conditions arose in a more aggravated form. Upon the advice of a physician the parties separated on September 28, 1904, and have since lived apart. It also appeared that the libelee was desirous of becoming pregnant, thinking that this would result in a cure of her difficulty; that there had been a complete consummation of the marriage, by complete acts of sexual intercourse on more than one occasion, though each time with great distress to her. There was a certain degree in each party of variation from the normal condition and juxtaposition of the sexual organs, and the difficulty resulted from these variations taken together; there would have been no difficulty in intercourse between him and

any other woman or her and any other man. Finally a physician advised them that they must absolutely separate, that sexual intercourse between them could not be continued; and they accordingly separated as aforesaid.

"Upon these facts I ruled that the libel could not be maintained, and ordered that it be dismissed; and now, at the request of the libelant, report it to the supreme judicial court for its decision. If on these facts the libelant is entitled to a divorce, my order is to be vacated, and a decree nisi entered in his favor; otherwise the libel is to be dismissed."

H. E. Whittemore, for the libelant.

No counsel appeared for the libelee.

<sup>195</sup> The COURT. On the facts stated in the report we are of opinion that the libelant is entitled to maintain his libel: G—— v. G——, L. R. 2 P. & D. 287; H—— v. P——, L. R. 3 P. & D. 126; Payne v. Payne, 46 Minn. 467, 24 Am. St. Rep. 240, 49 N. W. 230; D—— v. A——, 1 Rob. Ecc. 279; 2 Bishop on Marriage, Divorce and Separation, sec. 781, note 2.

According to the terms of the report the order of the superior court is to be vacated, and a decree nisi entered.

So ordered.

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### IMPOTENCY AS A GROUND FOR DIVORCE.

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#### I. Where Recognized.

In England, by the canon law, the incurable impotency of either of the parties to a marriage at the time it was contracted was recognized as a cause entitling the other to a divorce. It did not, indeed, make the marriage void, nor entitle either of the parties to a decree annulling it, or granting a divorce, after the death of the other: Anonymous, 24 N. J. Eq. 19; Smith v. Morehead, 6 Jones Eq. 360. In the United States, the grounds for divorce and the jurisdiction to

grant it are statutory, and a cause not designated in the statutes of a state enumerating such grounds cannot be considered, though confessedly justified a divorce under the canon law. Hence, where impotency is not mentioned in such a statute, it cannot sustain a suit for divorce: *Anonymous*, 24 N. J. Eq. 19; *Burtis v. Burtis*, Hopk. Ch. 557, 14 Am. Dec. 563. Defects of this character in the early American statutes have been very generally supplied, and therefore divorces are grantable because of the impotency of a spouse in the United States as well as in England: *Ferris v. Ferris*, 8 Conn. 166; *Griffith v. Griffith*, 55 Ill. App. 474, 162 Ill. 368, 44 N. E. 820; *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Chase v. Chase*, 55 Me. 21; *J. G. v. H. G.* 33 Md. 401, 3 Am. Rep. 183; *S. v. S.*, 192 Mass. 194, ante, p. 240, 77 S. E. 1025; *Payne v. Payne*, 46 Minn. 467, 24 Am. St. Rep. 240, 49 N. E. 230; *Kempf v. Kempf*, 3 Mo. 211; *Berdolt v. Berdolt*, 56 Neb. 792, 77 N. W. 399; *Bascomb v. Bascomb*, 25 N. H. 267; *Shafto v. Shafto*, 28 N. J. Eq. 34; *Keith v. Keith*, Wright, 518; *Ryder v. Ryder*, 66 Vt. 158, 44 Am. St. Rep. 833, 2 Atl. 1029.

## II. At What Time must Exist.

Of course, it is not material that either of the spouses was impotent at some time prior to the marriage, provided that condition does not subsequently continue; and a valid marriage having been contracted and consummated between competent parties cannot be dissolved for a misfortune or incapacity subsequently arising. Therefore, it is indispensable that the impotency should have existed at the time of the marriage, and it is not sufficient that it came into being and existed afterward: *Griffith v. Griffith*, 55 Ill. App. 474, 162 Ill. 368, 44 N. E. 820; *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Chase v. Chase*, 55 Me. 21, *J. G. v. H. G.*, 33 Md. 401, 3 Am. Rep. 183; *Bascomb v. Bascomb*, 25 N. H. 267; *Devanbagh v. Devanbagh*, Paige, 554, 28 Am. Dec. 443; *Berger v. Berger*, 23 Pa. Co. Ct. 23. Nor does impotency at the marriage necessarily entitle the other party to a divorce. Divorce, for this cause at least, is not granted on the theory that the defendant has been guilty of, and should be punished for, a violation of any marital obligation, but solely on the ground that the plaintiff may be released from a wedlock which has been, and apparently must continue to be, in name only, and doubtless if the impotency has terminated prior to the hearing, the divorce may properly be denied: *Berdolt v. Berdolt*, 56 Neb. 792, 77 N. W. 399. There are, in truth, decisions indicating that the impotency must continue for three years after the marriage (*Welde v. Welde*, 2 Lee Ecc. 580; *Marshall v. Hamilton*, 3 Swab. & T. 517, 1 Jur., N. S., 853), but these decisions really involve only questions of evidence. Rightly interpreted, they mean no more than that, in the absence of other evidence, impotency will not be presumed because there has been no sexual intercourse between the parties un-

less this condition has continued for more than three years after the marriage (*Marshall v. Hamilton*, 33 L. J. Mat. 159, 10 Jur., N. S., 853, 10 L. T. 787, 13 Week. Rep. 108; *M—— v. H——*, 34 L. J. P. & M., N. S., 12; *Sparrow v. Harrison*, 3 Curt. Ecc. 16); but if the evidence offered is sufficient to establish actual impotence, a divorce may be decreed therefor, however recently the marriage may have been contracted: *Anonymous*, 1 Spinks, 12, 22 Eng. L. & Eq. 637; *G—— v. T——*, 1 Spinks Ecc. 389; *D—— v. F——*, 34 L. J. P. & M., N. S., 66; *Greenstreet v. Cumyns*, 2 Phill. 10; *Briggs v. Morgan*, 3 Phill. 325; *F—— v. D——*, 4 Swab. & T. 86, 34 L. J. Mat. 66, 11 Jur., N. S., 307, 12 L. T. 84, 13 Week. Rep. 546; *M—— v. F——*, 2 Robt. E. R. 618.

### III. Must be Incurable.

A complainant seeking a divorce on account of the alleged incompetency of the defendant must allege and prove that the incompetency is incurable. It is not sufficient that the defendant, if the husband, has never sought sexual intercourse with complainant, or, if the wife, has resisted all attempt at such intercourse, though this fact may be admissible as evidence tending to establish his want of virility or her sexual incapacity: *Ferris v. Ferris*, 8 Conn. 166; *Lorenz v. Lorenz*, 93 Ill. 376; *S—— v. A——*, 47 L. J. P. 75, 3 P. D. 72, 39 L. T. 127; *F—— v. P——*, 75 L. T. 192. If the condition of the defendant is due to some disease curable by medicines or to some defect which will yield to, or be removed by, surgery, the divorce must be denied if he or she has not refused, and does not refuse, to submit to the requisite treatment: *Anonymous*, 35 Ala. 226; *Ferris v. Ferris*, 8 Conn. 166; *Lorenz v. Lorenz*, 93 Ill. 376; *Griffith v. Griffith*, 162 Ill. 368, 44 N. E. 820; *J. G. v. H. G.*, 33 Md. 401, 3 Am. Rep. 183; *Berdolt v. Berdolt*, 56 Neb. 792, 77 N. W. 399; *Bascomb v. Bascomb*, 25 N. H. 267; *Morrell v. Morrell*, 17 Hun, 324; *Devanbagh v. Devanbagh*, 6 Paige, 175; *Stagg v. Edgecomb*, 3 Swab. & T. 240, 9 Jur. 698, 32 L. J. P. & M. 153, 8 L. T., N. S., 643, 12 Week. Rep. 19; but upon such refusal, the impotency may be regarded as permanent; *L—— v. L——*, 51 L. J. P. 23, 7 P. D. 16, 47 L. T. 132, 30 Week. Rep. 444.

### IV. What Constitutes Impotency.

It is undoubtedly true that one who when married is incurably incapable of copulation or procreation is impotent in the sense in which that term is employed in the statutes and decisions relating to divorce. But in fact the inability of the man to beget or of the woman to conceive, even if proved by competent evidence, by no means establishes his or her impotency, nor does his or her ability to copulate necessarily prove the absence of such impotency. If the woman is at the time of her marriage already pregnant with an illegitimate child by a man other than her husband, of which fact he is not aware and he has no reason to suspect her of want of

chastity, he is, except in North Carolina (*Long v. Long*, 77 N. C. 324 Am. Dec. 449), entitled to a divorce, not because of her impotency, but because she is guilty of a fraud in contracting a marriage at a time when, because of such pre-existing pregnancy, she is incapable of conceiving issue to her husband and knows of her condition in that respect, or at least of her acts rendering the condition probable: *Baker v. Baker*, 13 Cal. 87; *Carris v. Carris*, 24 N. J. 1516; *Morris v. Morris*, Wright, 630; *Appeal of Allen*, 99 Pa. 196, Am. Rep. 101; *Caton v. Caton*, 6 Mackey, 109; *Mop v. Mop*, 66 J. P. 104, [1897] P. 263, 77 L. T. 220, 45 Week. Rep. 635. With the exception, the most conclusive and satisfactory evidence of the inability of the wife to conceive or of the husband to beget will not authorize a divorce, though his or her spouse did not know, and had no reason to suspect, such inability when the marriage was contracted, provided always that the ability to copulate exists: *Anonymous*, 89 Ala. 291, 18 Am. St. Rep. 116, 7 South. 100, 7 L. R. 425; *Jorden v. Jorden*, 93 Ill. App. 633; *Payne v. Payne*, 46 Minn. 467, 24 Am. St. Rep. 240, 49 N. W. 230; *Deane v. Aveling*, 1 Rob. Ecc. 299. On the other hand, though copulation is possible and has repeatedly taken place between the parties, and still remains possible, there may be impotency within the meaning of the law if it has taken place and can be repeated only at great and unusual risk to the health of one of the parties, or has inflicted and must continue to inflict upon one of them great and unusual suffering. The most familiar and unquestionable example of this exists when one of the spouses is afflicted with a loathsome disease, which will probably be communicated to the other by personal contact: *Ryder v. Ryder*, 66 Vt. 158, 44 Am. St. Rep. 833, 28 Atl. 1029. In cases of this class the condition of the defendant is usually due to some immoral act on his or her part. But there is a well-established class of cases in which neither party can truly be said to be blamable, as where one of them from extreme sensibility or from some defect or malformation of a sexual organ is either incapable of copulation or cannot submit thereto without great suffering, in which case, though sexual intercourse is possible, the party must be deemed impotent: *G. v. H. G.*, 33 Md. 401, 3 Am. Rep. 183; *S. v. S.*, 1 Mass. 194, ante, p. 240, 77 N. E. 1025; *Dean v. Aveling*, 1 Rob. Ecc. 298; *Lewis v. Hayward*, 35 L. J. P. & M., N. S., 105; *G. v. G.*, L. R. 2 P. & D. 287; *H. v. P.*, H. L. R. P. 126. "Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse. We apprehend that all are agreed that in order to constitute the marriage bond between young persons there must be the power, present or to come, of sexual intercourse. Without that power, neither of the principal ends of matrimony can be attained, namely, a lawful indulgence of the passion to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence": *Deane v. Aveling*.



1 Rob. Ecc. 298; G—— v. G——, L. R. 2 P. 287, 40 L. J. Mat. 83, 25 L. T. 510, 20 Week. Rep. 103. Such intercourse being impossible, one or the other of the parties is impotent, but, as already shown, the fact that intercourse has been and must continue to be without progeny does not establish the impotency of either spouse. The ability for intercourse must be with the spouse, and it is not a sufficient defense that the one sued is capable of complete sexual intercourse with any person of the opposite sex, other than the complainant: Countess of Essex's Case, 2 How. St. Tr. 786; N—— v. M——, 1 Spinks Ecc. 12, 2 Rob. Eq. 625, 22 Eng. L. & Eq. 637. In the principal case the incredible state of facts was presented that each of the parties appeared to be capable of copulating with every competent person of the opposite sex save his or her spouse, and not absolutely incapable as to such spouse. Nevertheless, the action of the trial court in denying a divorce was reversed and, under the authorities, properly. Each of the parties was equally entitled to a divorce. The husband happened to be the complainant and the wife defendant, but a like decree must have resulted had she been the complainant and he the defendant.

V. The Cause of the Impotency is Immaterial provided it did not result from the act or procurement of the complainant. Such cause may be natural, or due to an accident, or produced by disease, especially when the disease results from the self-abuse or misconduct of the defendant: Griffith v. Griffith, 162 Ill. 368, 44 N. E. 820; S—— v. S——, 3 Swab. & T. 240.

#### VI. The Evidence.

Courts must often experience difficulty in reaching a satisfactory conclusion from the evidence submitted to them, because (1) the fact of impotency may be difficult of proof; (2) none but the parties may have the knowledge requisite to testify, and the law may not permit a divorce without corroboration of their testimony; and (3) collusion may prevent the making of a vigorous, bona fide defense. The confession of either party is admissible: Welde v. Welde, 2 Lee Ecc. 580; Pollard v. Wybourn, 1 Hagg. Ecc. 725; Sparrow v. Harrison, 2 Curt. Ecc. 16; and so his or her testimony, but unless corroborated will not warrant a decree: M—— v. J——, L. R. L. P. & D. 460. Perhaps the most satisfactory evidence is that developed from an examination of the persons of the parties by competent physicians, which examination should be ordered by the court, and must be submitted to by the parties, or at least by the one of them whose capacity is questioned: Anonymous, 89 Ala. 291, 18 Am. St. Rep. 116, 7 South. 100, 7 L. R. A. 425; Shafto v. Shafto, 28 N. J. Eq. 34; Le Barron v. Le Barron, 35 Vt. 365; B—— v. L——, L. R. 1 P. & D. 639, 3 L. J. Mat. 35, 20 L. T. 280; T—— v. M——, L. R. 1 P. & D. 31; Serrell v. Serrell, 2 Swab. & T. 422, 31 L. J. Mat. 55, 5 L. T. 691.

The refusal of a party to submit to a physical examination is persuasive, and perhaps sufficient, evidence of impotency, there being no reason to suspect collusion.

#### VII. Age is a Bar.

We believe there is no presumption of law respecting the age at which a person is necessarily incapable of procreation. If so, it would seem difficult to affirm, as a matter of law, that one contracting marriage with another "stricken in years" cannot be heard to complain of impotence on the part of the spouse: *Williams v. Homfray*, 2 Swab. & T. 240, 30 L. J. Mat. 73, 7 Jur., N. S., 315, 4 L. T. 89, 1 Week. Rep. 619. Nevertheless, some of the courts which have spoken on the subject have inclined to the view that a man marrying a woman somewhat over fifty years of age will not be heard to complain of her impotency as a ground for divorce (*Briggs v. Morgan*, 1 Phill. 325, 2 Hagg. Cons. 324; *Brown v. Brown*, 1 Hagg. Ecc. 52). And at all events, that out of consideration for her age, she will not be required to submit to a surgical examination to enable him to procure evidence on the subject: *Shafto v. Shafto*, 28 N. J. Eq. 34.

#### GRAY v. WHITEMORE.

[192 Mass. 367, 78 N. E. 422.]

**PERPETUITIES.**—If an Interest Begins Within, It may be Extended Beyond, the Time Prescribed in the rule against perpetuities. (p. 250.)

**PERPETUITIES.**—A Trust to Pay Income to the Sons and Daughters of the Testator Who Shall Survive Him, During Their Lives, and on the Death of Either, Then to His or Her Surviving Spouse so long as he or she remains unmarried, does not offend the rule against perpetuities. (pp. 250, 251.)

**PERPETUITIES.**—A Trust to Pay Income to the Sons and Daughters of the Testator for Life, and after the death of any of them leaving no surviving spouse, then to the children of such deceased son or daughter, is valid. (p. 251.)

**PERPETUITIES.**—A Remainder Limited upon Two Distinct Events, One of Which Must Happen Within, and the Other may Happen Beyond, the time prescribed by the rule against perpetuities is good as to the former. (p. 251.)

**PERPETUITIES.**—A Trust to Pay Income, upon the death of the testator's children, to the issue of such as leave no surviving spouse, and as to those who leave a surviving spouse, then upon the marriage or death of such surviving spouse, to the issue of such spouse and of the child of the testator, is not within the rule against perpetuities as to the issue of such decedent's children as die leaving

no surviving spouse, but as to the other class, is within such rule, because it may happen that the death of one of such surviving spouses may be more than twenty-one years after the termination of all lives in being when the trust was created. (p. 251.)

**PERPETUITIES.—A Gift or Grant Must Take Effect Within the Period Prescribed to escape the rule against perpetuities; it is not sufficient that it may take effect within that time.** (pp. 251, 252.)

**PERPETUITIES.—Remainders Which Necessarily Vest Within the Time Prescribed, Though the Actual Payment or Transfer to the Beneficiary is Postponed to a Later Period, are valid.** (p. 252.)

**PERPETUITIES.—Interests Which Vest Absolutely or Contingently Within Lives in Being.—**If a trust is created by a testator to pay the income to his children for their lives, and on the death of any son, to his widow for her life, and upon the death of any daughter, to her surviving husband for life, and upon the death of any child of the testator leaving no surviving widow or husband, or the death of any surviving husband, or death or the marriage of any such widow, to transfer a proportionate share to the issue, if any, of his deceased son or daughter, and in case of default of such issue at the time of such decease or marriage, to pay or transfer such share to the heirs at law of such deceased son or daughter, the issue of the children of the testator take their interest at or before the death of their parents, and whether such interest be regarded as absolute or as contingent upon the death of the surviving husband or wife of their respective parents, then their interests must necessarily vest within the time allowed by the rule against perpetuities. (p. 254.)

**WILLS.—Perpetuities.—Vested Interest, When will not be De-vested.—**An absolute bequest which has once vested in interest in the beneficiary will not be divested for the benefit of the testator's heirs merely because a subsequent limitation, which is intended to take effect neither as an executory devise or by reducing in the contingency named the absolute interest previously given, must fail of effect. (pp. 254, 255.)

**WILLS.—If a Limitation Over is Void for Remoteness, it places all prior rights in the same situation as if the devise over had not been made.** (pp. 254, 255.)

**WILLS, Constructing.—**When the Language of the Testator is of Doubtful Import Remainders will be Regarded as Vested, unless a contrary intention is to be gathered from the provisions of the will. (pp. 255, 256.)

**DOWER cannot Exist in an Estate of Which the Husband in His Lifetime had No Present Estate or Inheritance.** (pp. 257, 258.)

**WILLS, Heirs at Law, Who are.—**A Trust or Bequest in Favor of the Heirs at Law of a Child of the Testator means those who would inherit his estate at the time of his death. (p. 258.)

**WILLS.—Heirs at Law, Husband, When may Take as.—**If, by statute, a husband surviving his wife who leaves no issue is entitled to take her real property up to a sum specified, he is entitled up to such amount to take property devised to his wife's heirs at law. (p. 262.)

**REAL ESTATE.—Conversion of Proceeds of into Personalty.—**The proceeds of realty originally held in a trust fund, but sold and changed into personal property by the trustees, under a power given them by a will authorizing them to sell to change investments, retain their original character of real property and must be so treated in distributing the trust fund. (pp. 262, 263.)

Roland Gray, for the trustees.

E. M. Brooks, for Josephine P. Thwing.

J. P. Richardson and W. W. Hart, for Malcolm McLoud.

J. G. Palfrey, for George L. Whittemore.

C. A. Whittemore, for George P. Gifford, and others.

R. F. Sturgis, for Marion St. C. Whittemore and Charles S. Clark, her guardian.

C. S. Ward, for Anna E. Bowman.

F. W. Knowlton, for Thomas Whittemore.

<sup>369</sup> SHELTON, J. Thomas Whittemore died on March 21, 1861, leaving a will, by the fifth clause of which he bequeathed all the residue of his estate to trustees in trust to pay the net income thereof to such of his children as should survive him, during their lives; and also upon the death of any of his sons "to pay to the widow or widows of such sons or sons, if any, the respective shares of income which would have been paid to the deceased husband or husbands, if living; to wit, so long as she or they shall remain the widow or widows of such deceased; and upon the death of any of my daughters who shall survive me, to pay to the surviving husband or husbands of such deceased, if any, the respective shares of income which would have been paid to the deceased wife or wives if living: to wit, during the natural life of the lives of such husband or husbands; and upon the <sup>370</sup> death of any of my sons leaving no widow, or of any of my daughters leaving no husband, or of any husband of any of my daughters, who shall survive such daughter, and upon the death or marriage of any widow of any of my sons, such share of the principal sum and estate so held in trust, as shall be proportional to the income that would have been paid to such deceased son, daughter, daughter's husband or son's widow shall be paid or transferred to the issue, if any, of such deceased son or daughter; and in default of such issue at the time of such decease or marriage, the same shall be paid or transferred to the respective heirs at law of such my deceased son or daughter; and this provision shall take effect, both in the case of such issue, and in the case of default of such issue at the time of such decease or marriage, whether such de

cease or marriage take place after my own death or before. . . . And I hereby empower my said trustees and their successors, to sell and convey any or all of said trust property, discharged of the trusts, and without obligation upon the purchasers to see to the application of the purchase money; and the proceeds shall be held upon the same trusts."

The testator left surviving him a widow, who has since died, and eight children: John M. Whittemore, Thomas Whittemore, Benjamin B. Whittemore, Abby E. Ruggles, Lydia A. Lucas, Joseph Whittemore, Lovice C. Cowles and Eliza A. Gifford. All these children have now died, the first named in November, 1861, and the others at various dates since that time, some leaving only a widow or husband, some leaving only issue, and some leaving both issue and a widow or husband. The trustees have distributed according to the terms of the will four of the eight shares which made up the trust fund, being the shares which became divisible by the death of the children and their surviving husbands or wives before 1904; one share is still held for the benefit of the widow of a son of the testator for her life or widowhood; all the life interests in the other three shares of the trust fund created by the will have now come to an end; and the plaintiffs, who are the present trustees under the will, ask that they may be instructed to what persons and in what proportions they should distribute these three shares.

The defendants Josephine P. Thwing and McLoud contend <sup>371</sup> that the remainders which are attempted to be created by the residuary clause of the will in question are all invalid on the ground of remoteness under the rule against perpetuities, and especially that the gifts over upon the death or remarriage of the surviving husbands or wives of the testator's children are so invalid, both in the event of there being issue of the children surviving at the time of such death or remarriage and in the event of there being no issue surviving at that time, and that the residue of the testator's estate must now, after the death of all his children, be taken to be undisposed of by his will, and must go to the persons who now represent those who were his heirs at law or next of kin at the time of his death. Mrs. Thwing also contends that she is in no way precluded from asserting her full rights by the distributions that have been made of the four shares of which the income was payable to John M. and Thomas

Whittemore and Mrs. Ruggles and Mrs. Gifford, or by allowance of the trustees' accounts which showed such contributions. She contends that she is entitled to a common-law dower interest in her husband's share of this residue, far as it consisted of real estate, and to the personal property, to the amount of five thousand dollars, and to one-half of the excess above ten thousand dollars. She also claims that if the whole will is valid, she was yet one of the heirs at law of her deceased husband, John M. Whittemore, a son of the testator; that on her remarriage one-eighth of the residuary principal was payable to his heirs, and that of that one-eighth share she was entitled to have her dower in the real estate, and her distributive share in the personalty. The defendants Wellington and McLoud contend that past contributions, whether erroneous or not, cannot now be inquired into or taken into account, and that their intestates Lucas and Cowles are entitled each to the share of his deceased wife either as her devisee and legatee or as her statutory heir as next of kin, whether the limitations made by the residuary clause of the will in question were valid or invalid. The defendant Wellington also contends that if these limitations were valid, Cowles was entitled in the right of his deceased wife to participate in the distribution of the shares of what Mrs. Lucas had received the income, when the right to that distribution accrued on the death of Mrs. Lucas in 1904. In the event of some of these contentions <sup>372</sup> being sustained, it will also be material to determine whether the fund in the hands of the trustees is to be regarded wholly as personal estate, or whether that part of the fund which consists of the proceeds of real estate sold on or before April, 1898, is so to be treated as real estate.

We see no ground for the contention that the limitations of the remainder immediately after the life estates given to the testator's children are too remote. Of necessity the children of the testator who survived him must all be in existence at the time of his death; and their life estates must all expire within the limit of lives then in being. It is settled that an interest is not obnoxious to the rule against perpetuities if it begins within the prescribed period, although it may extend beyond that limit: *Gray on Rule Against Perpetuities*, 2d ed., § 232, and cases there cited. The life estates given to the surviving husbands or wives of the testator's children are the

fore valid. And we are of opinion that the limitation of the principal sum of a share to the issue of his children who should die leaving no husband or wife is also valid. The remainder to the issue of his children is given upon two alternatives—first upon the death of his children respectively without leaving any surviving husband or wife, and secondly upon the death of any surviving husband or the death or remarriage of any surviving widow. If we assume, for the sake of the argument, that the remainder limited upon the latter event is to go only to the issue in existence at that later time, is merely contingent and comes (as in that case it might come) within the rule against perpetuities, yet the remainder limited upon the former event, a wholly distinct and separate event, would be valid: Gray on Rule Against Perpetuities, sec. 341 et seq.; *Stone v. Bradlee*, 183 Mass. 165, 66 N. E. 708; *Seaver v. Fitzgerald*, 141 Mass. 401, 6 N. E. 73; *Jackson v. Phillips*, 14 Allen, 539. This is not the case of a limitation expressed to be made upon one double contingency or upon the happening of two events which the testator has not separated, but one in which the testator has himself made the distinction and separation between the two different events, either one of which, if it occurs, will exclude the existence of the other: *Miles v. Harford*, 12 Ch. D. 691; *Monypenny v. Dering*, 2 De Gex, M. & G. 145; *Leake v. Robinson*, 2 Mer. 363. It is true, no doubt, that where the testator has made only one contingency, though <sup>373</sup> depending upon a twofold event, the courts will not split this up into two contingencies, one good and one bad, and sustain the limitation on the ground that only the good contingency has taken place: *Proctor v. Bishop of Bath*, 2 H. Black. 358; *In re Harvey*, 39 Ch. D. 289; *Hancock v. Austin*, [1902] App. Cas. 14. But this is not such a case. And see the decisions cited in 22 Am. & Eng. Ency. of Law, 2d ed., 708. However it may be, therefore, in the cases of other children, we are clearly of opinion that the limitation to the issue of those of the testator's children who should die without leaving a husband or wife surviving her or him was valid. It follows, accordingly, that the limitations to the issue of Thomas Whittemore and of Eliza A. Gifford were valid, and the distributions of the shares of the trust fund of which they had respectively received the income were properly made by the trustees to their issue in accordance with the terms of the will.

But it is contended that the life estates given to the surviving husbands or wives of the testator's children might beyond the measure established by the rule against perpetuities, of a life or lives in being and twenty-one years thereafter; for one of his children might marry a person not being at the time of his decease, and such person might be the survivor of the marriage; so that remainders which could take effect only upon the death or remarriage of any such surviving husbands or wives might not become vested within the necessary period: *Sears v. Russell*, 8 Gray, 86; *Lett v. Randall*, 3 Smale & G. 83; *Goodier v. Johnson*, 18 Ch. D. 4. Undoubtedly this is true. And, as was said in the leading case of *Brattle Square Church v. Grant*, 3 Gray, 142, 63 Am. Dec. 725, quoted and followed in *Sears v. Putnam*, 102 Mass. 5, "in order to test the legality of a limitation, it is sufficient that it be capable of taking effect within the prescribed period; it must be so framed as ex necessitate to take effect, if at all, within that time." As has been stated, a remainder that could not become vested until the death or marriage of the surviving husbands or wives of the testator's children might by possibility not take effect until after the expiration of the prescribed period, and so could not be sustained: *Gray on Rule Against Perpetuities*, 2d ed., sec. 2, and cases there cited. Remainders, however, that should appear to be so limited<sup>374</sup> as necessarily to vest in interest within the period limited by the rule would be valid, even though the actual payment and transfer to the beneficiaries of the right to actual possession and enjoyment, might be postponed to a later period: *Stone v. Forbes*, 189 Mass. 163, 170 N. E. 141; *Loring v. Blake*, 98 Mass. 253; *In re Appleton*, [1903] 1 Ch. 565; *Christie v. Gosling*, L. R. 1 H. L. 2; *Wainwright v. Miller*, [1897] 2 Ch. 255; *In re Roberts*, 189 Ch. D. 520. Accordingly, it becomes material to determine whether the interests here given in remainder were vested or contingent.

This question must be settled upon the fair construction of the language used by the testator, so as to ascertain and carry out the intent shown by the words he has used: *Crape v. Pratt*, 190 Mass. 317, 76 N. E. 1043; *Pearks v. Moseley*, 5 App. Ct. 714. That language has already been quoted and need not be repeated. It is in substance a direction to his trustees upon the death of any of his sons to pay his (the son's) share



income to his widow, if any, during her widowhood; and upon the death of any of his daughters, to pay her share of income to her surviving husband, if any, for life; and upon the death of any of his children leaving no surviving widow or husband, or the death of any surviving husband or the death or marriage of any such widow, to pay or transfer a proportional share of the principal sum to the issue, if any, of his deceased son or daughter, and in the case of default of such issue at the time of such decease or marriage, to pay or transfer such share to the heirs at law of such deceased son or daughter.

It has been argued that the words "in the case of default of such issue at the time of such decease or marriage" can refer only to the death of a child unmarried or of a surviving husband or the death or remarriage of a surviving wife; but we are of opinion that these words have a somewhat broader signification and must be taken to refer also to the death of a child of the testator whether or not leaving a surviving husband or wife. It follows, accordingly, that the final limitation to the heirs at law of the respective children of the testator is also made to depend upon either one of two separate and distinct events—first, the failure of issue at the death of the child himself, and secondly, the failure of issue at the death or marriage of the <sup>375</sup> child's surviving husband or wife. That is, this part of the will must be read as if the words used had been, "and in default of such issue at the time of the decease of my sons or daughters respectively, or of the decease of the surviving husband of any of my daughters, or of the decease or marriage of the widow of any of my sons, the same [share of the trust fund] shall be paid or transferred to the respective heirs at law of such my deceased son or daughter." Manifestly this is a limitation upon the happening of either one of the alternative events, which have been separated and distinguished by the testator himself: See the cases cited *supra*. The first of these events must happen, if at all, within the necessary limit of time; and it actually has so happened in the cases of John M. Whittemore, a son, and Mrs. Lucas and Mrs. Cowles, daughters of the testator, each one of whom has died, leaving respectively a wife or a husband, but no issue. In each of these cases, we are of opinion that the limitation to the heirs at law of the deceased child took effect and became vested upon the decease of that child, though subject in each case to be post-

poned as to actual possession and enjoyment until the termination by death or marriage of the life estate given to the surviving husband or wife. The doctrine was declared in the commonwealth in *Loring v. Blake*, 98 Mass. 253. In the case of John M. Whittemore, the life estate of his widow came to an end in 1863 by her remarriage; in the cases of Mrs. Lucas and Mrs. Cowles, they came to an end respectively in 1881 and 1905, by the deaths of Edmund G. Lucas and John E. Cowles. Accordingly, the share of which John M. Whittemore, and after his death until her remarriage, Josephine Thwing received the income was properly distributed by the then trustees to his heirs at law in accordance with the directions of the will; and the shares of which Mrs. Cowles received after her death John E. Cowles, and of Mrs. Lucas and after her death Edmund G. Lucas, received the income should not be distributed among the heirs at law of Mrs. Lucas and Mrs. Cowles respectively.

Three of the testator's children, Benjamin B. Whittemore, Joseph Whittemore and Mrs. Ruggles, died, each leaving issue and also a surviving wife or husband. In each of these cases it remains to be determined whether the issue took at or before the death of their parent vested interests in proportion to the shares of <sup>376</sup> the fund, or whether their remainders were contingent only, and could not become vested until the subsequent death of the surviving husband or wife of their respective parents. If the remainders to the issue of these three children were vested before the death of their parent, or even if before that time they were contingent merely, but became vested upon the deaths of their respective parents, then it is evident both as a matter of sound reason and upon the authorities heretofore cited, that their interests not only did in fact vest but of necessity must vest, before the period fixed by the rule against perpetuities—i. e., a life or lives in being and twenty-one years thereafter—could expire. In that event, it would not be necessary to determine whether the further limitation to the heirs at law of these children upon a failure of issue at the subsequent death or marriage of their surviving husbands or wives could take effect otherwise than by way of executory devise divesting the absolute interests that would already have become vested in such issue in favor of the heirs at law of their ancestor, and whether it would not thereby be obnoxious to the rule against perpetuities and would have

to be treated as void, or whether it could be maintained as a remainder vesting either at the death of the testator or at the respective deaths of these children: See, as to this, besides other cases cited herein, *Lorin v. Blake*, 98 Mass. 253; *Dove v. Torr*, 128 Mass. 38; *In re Hancock*, [1901] 1 Ch. 482. If the final limitation is valid, then a fortiori that which we are now considering must be sustained. If it is invalid, yet the rule is settled that an absolute bequest which once has vested in interest in the beneficiary will not be divested for the benefit of the testator's heirs at law merely because a subsequent limitation, which is intended to take effect either as an executory devise or by reducing in the contingency named the absolute interest previously given to a base fee, must fail of effect: *Goodier v. Johnson*, 18 Ch. D. 441. As was said in *Lovering v. Worthington*, 106 Mass. 86, "the general rule is, that, if a limitation over is void for remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted. If the prior gift was in fee, the estate is vested in the first taker discharged of the limitation over; if for life, it takes effect as a life estate": *Sears v. Putnam*, 102 Mass. 5. In the case at bar, the gift to the issue of these children, if <sup>377</sup> a vested interest, is absolute, or in fee. If the final limitation over to the children's heirs at law was valid, yet it has not taken effect, for there was no failure of issue on the death of the surviving husband or wife; if the final limitation is invalid, it is simply to be disregarded, and the issue retain the absolute estate which has once vested in them: *Brattle Square Church v. Grant*, 3 Gray, 142, 63 Am. Dec. 725. Accordingly, if by the proper construction of the will the remainders to the issue of the three last-mentioned children of the testator became vested interests either before or at the respective deaths of those children, then the further limitation to the heirs at law is simply to be disregarded, and the estates given to the issue remain absolute. Nor need we consider whether the issue of these children, each one of whom left a surviving husband or wife, took vested remainders before the deaths of their parents; for it is enough here if such remainders became vested at the time of such deaths. If Joseph Whittemore's son, John St. Clair Whittemore, who died before his father, had such a vested interest, then upon his death leaving a daughter, his interest passed to and became vested in her: *Lee v. Welch*, 163 Mass. 312, 39 N. E. 1112;

Jackson v. Jackson, 153 Mass. 374, 25 Am. St. Rep. 643, N. E. 1112, 11 L. R. A. 305; Hills v. Barnard, 152 Mass. 25 N. E. 96, 9 L. R. A. 211; Hall v. Hall, 140 Mass. 267 N. E. 700; Campbell v. Stokes, 142 N. Y. 23, 36 N. E. 8. The issue take per stirpes: Coates v. Burton, 191 Mass. 180 N. E. 311; Daggett v. Slack, 8 Met. 450.

Did, then, the issue of these children take vested remainder at any rate upon the decease of their respective parents? is a general rule of construction that when the language used by a testator is of doubtful import, remainders will probably be regarded as vested, unless a contrary intention is to be gathered from the provisions of the will: Minot v. Purriton, 190 Mass. 336, 77 N. E. 630; Bosworth v. Stockbridge, Mass. 266, 75 N. E. 712, and cases there cited; Knowlton v. Sanderson, 141 Mass. 323, 6 N. E. 228; Minot v. Harris, Mass. 528; Dingley v. Dingley, 5 Mass. 535. As was said by Knowlton, C. J., in Bosworth v. Stockbridge, 189 Mass. 266, 75 N. E. 712: "Hale v. Hobson, 167 Mass. 397, 49 N. E. 913, Harding v. Harding, 174 Mass. 268, 54 N. E. 549, and other cases relied upon by some of the respondents, are departures from this rule; but they are cases in which the court found, in the will, evidence of a clear intention that the estate should not vest until the death of the life tenant." <sup>378</sup> And it is to be observed that all the limitations here in question are to the direct descendants of the testator; a circumstance which has been deemed to warrant the inference that vested rather than contingent remainders were intended to be created: Gibbens v. Gibbens, 140 Mass. 102, 55 Am. R. 453, 3 N. E. 1; Stanwood v. Stanwood, 179 Mass. 223, 60 N. E. 584; Bancroft v. Fitch, 164 Mass. 401, 41 N. E. 661. The rule is the stronger when the remainders limited would be void for remoteness if held to be contingent: Loring v. Blake, Mass. 253; Seaver v. Fitzgerald, 141 Mass. 401, 6 N. E. 1. In re Turney, [1899] 2 Ch. 739; St. John v. Dann, 66 Conn. 401, 34 Atl. 110; Post v. Hover, 33 N. Y. 593; McBride's Estate, 152 Pa. 192, 25 Atl. 513. A somewhat strained construction has sometimes been adopted for this purpose: Taylor v. Frobisher, 5 De Gex & S. 191; Berkeley v. Swinburne, Sim. 275. But apart from any such general rule of construction we think it manifest that the intention of this testator was that the issue of his children should take a fixed and vested interest, at least at the time of the decease of their

spective parents: *Otis v. McLellan*, 13 Allen, 339. It was expressly held in that case upon a limitation to issue postponed in actual payment in substantially the same manner as in the case before us until the death of any surviving husband or wife, that the right of the issue vested in interest upon the death of the children of the testator, subject only to the life estate of any surviving husband or wife in the income. The mere fact that the actual payment and transfer to the issue is not to be made until the expiration of the previous life estate is not enough to control this intent: *Otis v. McLellan*, 13 Allen, 339; *Evans v. Walker*, 3 Ch. D. 211; *Wainwright v. Miller*, [1897] 2 Ch. 255; *Siddall's Estate*, 180 Pa. 127, 36 Atl. 570.

Accordingly, we are of opinion that the remainders severally limited to the issue of Benjamin B. Whittemore, Joseph Whittemore and Abby E. Ruggles vested in such issue at the decease of their parents, though the right of present possession was postponed in each case until the expiration of an intervening life estate: *Lombard v. Willis*, 147 Mass. 13, 16 N. E. 737; *Pike v. Stephenson*, 99 Mass. 188; *Bowditch v. Andrew*, 8 Allen, 339. Not only is this construction in accord with the manifest intent of the testator and effectual to accomplish the object which he had in <sup>379</sup> view, but the opposite construction "would defeat that purpose, by creating a perpetuity which the law would not sustain. In such a case, the court is bound to adopt that construction which will sustain the will and effectuate the objects of the testator": *Loring v. Blake*, 98 Mass. 253; *Galland v. Leonard*, 1 Swan. 161; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388. In the cases in which the life estate has now terminated, the plaintiffs are therefore to be instructed that distribution is to be made to the issue of the testator's children, if any.

It has been argued in behalf of Mrs. Thwing that the distributions which were made by the then trustees upon her remarriage and the deaths of Thomas Whittemore, Otis T. Ruggles and Eliza Gifford of the four shares to the income of which they had respectively been entitled were erroneously made; but it has been found by the single justice before whom this case was heard that these distributions were all made in accordance with the directions of the will. It results from what already has been said that these distributions were properly made. Mrs. Thwing could have had no dower or interest

in the nature of dower in real estate of which her husband had in his lifetime no present estate of inheritance. "The widow is not entitled to dower in a vested remainder: *Evered v. Forrestal*, 7 Mass. 253; *Brooks v. Everett*, 13 Allen 457": Allen, C. J., in *Watson v. Watson*, 150 Mass. 84, 12 N. E. 438. She cannot as dowress be regarded as an heir of her husband: *Proctor v. Clark*, 154 Mass. 45, 27 N. E. 612, 12 L. R. A. 721. Nor has she the rights of a distributee, under the limitations of this will: *Fabens v. Fabens*, 141 Mass. 395, 5 N. E. 650; *Olney v. Lovering*, 167 Mass. 446, 45 N. E. 776. Her deceased husband, of course, could not be an heir at law of his brothers and sisters who survived him. Even Mrs. Thwing's rights had been disregarded in these distributions, it would be at least difficult to say that any errors in them could now be corrected, after they have been allowed by decrees of the probate court, which are found to have been made after proper notice: See *Minot v. Purrington*, 190 Mass. 336, 77 N. E. 630, and cases there cited. Nor is it necessary to consider how far any of the parties objecting to these distributions, which appear to have been made respectively in 1863, 1872, 1877, and 1898, are barred by laches from now raising objections to them, after having acquiesced in them since the <sup>380</sup> times stated: *Lindsey v. Fabens*, 189 Mass. 375, 75 N. E. 623; *In re Whittemore*, 157 Mass. 46, 35 N. E. 79; *Wagner v. Baird*, 7 How. 234, 12 L. ed. 681.

It is necessary also to determine who are the persons entitled to take under the designation "heirs at law" of deceased children. In each of the cases in which such heirs take under the limitations of this will, they are necessarily to be determined at the death of the particular child in question: *Dove v. Tilton*, 128 Mass. 38; *Proctor v. Clark*, 154 Mass. 45, 27 N. E. 612, 12 L. R. A. 721; *International Trust Co. v. Williams*, 173 Mass. 173, 66 N. E. 798. It is because the limitation in this will in favor must take effect at that time that its validity has been sustained in what has been said heretofore. And we think it manifest that by these words, in the connection in which they are used, the testator intended to designate those who under the law of this commonwealth would inherit the real estate of the person whom they represent. This case comes under the rule of *Clarke v. Cordis*, 4 Allen, 466, and *Lombard v. Boyd*, 5 Allen, 249, in which it was held that where real and personal estate are included in a single provision, by which the income

is to be paid to life tenants, and at the expiration of the life estates the trustees are to pay and transfer the whole property to the legal heirs either of the testator or of one of the life tenants, there being no indication that more than one class is intended or that the two kinds of property are to go in different directions, the whole property will go to those who are technically described as heirs: *Welch v. Brimmer*, 169 Mass. 204, 47 N. E. 699; *Olney v. Lovering*, 167 Mass. 446, 45 N. E. 776; *Proctor v. Clark*, 154 Mass. 45, 27 N. E. 673, 12 L. R. A. 721; *Lincoln v. Perry*, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215; *Fabens v. Fabens*, 141 Mass. 395, 5 N. E. 650; *Merrill v. Preston*, 135 Mass. 451; *Rand v. Sanger*, 115 Mass. 124; *Holbrook v. Harrington*, 16 Gray, 102; *Daggett v. Slack*, 8 Met. 450. An apparently stronger statement of this doctrine in *Loring v. Thorndike*, 5 Allen, 257, turns upon the evident intention of the testator. In the cases in which, under somewhat similar circumstances, the word "heirs" has been construed to have other than its common-law meaning, so as to include those who would take personal property, either alone or together with heirs strictly so called, it generally will be found either that the fund consisted wholly of personal property, or that any real estate included therein was directed by the testator to be converted into personal property, or that<sup>381</sup> the decision turned upon what was found to be the particular intention of the testator: *Lawrence v. Crane*, 158 Mass. 392, 33 N. E. 605; *Kendall v. Gleason*, 152 Mass. 457, 25 N. E. 838, 9 L. R. A. 509; *White v. Stanfield*, 146 Mass. 424, 15 N. E. 919; *Sweet v. Dutton*, 109 Mass. 589, 12 Am. Rep. 744; *Houghton v. Kendall*, 7 Allen, 72. And in many of these cases the general rule which we have stated is fully recognized in the opinion of the court: See, for example, the language of Allen, J., in *Lawrence v. Crane*, 158 Mass. 392, 33 N. E. 605. This, in the contingency which has occurred, was a substantive gift to the heirs of these children of something which their parents were in no event to take; the circumstances are almost the same as those which existed in *Fabens v. Fabens*, 141 Mass. 395, 5 N. E. 650, and the principle laid down in that case must be followed here.

The shares now to be distributed are those of which the income was paid to Mrs. Lucas, Mrs. Cowles, and Joseph Whittemore. In each of these cases the income has until recently been paid to a surviving husband or wife; but these life

estates have now ended. Joseph Whittemore left issue, nothing need be added to what has been said concerning distribution of that share. But Mrs. Lucas and Mrs. Cowles left no issue; and these shares are now to be paid and distributed to their heirs at law; and in each case the representative of her deceased husband claims to be entitled to a portion of the fund on the ground that he was a statutory heir of his deceased wife.

By the law of this commonwealth, both in 1885 and in 1890, at the respective times of the decease of Mrs. Lucas and Mrs. Cowles, a husband surviving his wife who left no issue took a life estate in fee to the amount of five thousand dollars. Pub. Stats., c. 124, sec. 1. It has been held that this right was sufficient to entitle him, up to this amount, to property devised to his wife's heirs at law, unless a contrary intention was shown by the will: *Olney v. Lovering*, 167 Mass. 446, 4 N. E. 776; *Proctor v. Clark*, 154 Mass. 45, 27 N. E. 673, 18 R. A. 721; *Lincoln v. Perry*, 149 Mass. 368, 21 N. E. 67, 18 L. R. A. 215; *Lavery v. Egan*, 143 Mass. 389, 9 N. E. 13. Nor is the mere fact that the surviving husband was given a life estate by the will sufficient to prevent him from taking also as one of the remaindermen: *Smith v. Smith*, 186 Mass. 138, 71 N. E. 314; *Cushman v. Arnold*, 185 Mass. 165, 7 N. E. 43; *Chesman v. Cummings*, 142 Mass. 65, 7 N. E. 13. This general rule cannot prevail against <sup>382</sup> the plain intention of the testator as shown by the language of his will, and it has been argued that it does appear by this will that he did not intend the surviving husbands or wives of his children to take as their heirs at law. It is contended that the whole scheme of the will was to provide for the testator's direct descendants, by giving finally the share set apart for the benefit of each child to his issue, if any, and otherwise to his other descendants of the testator as the child's heirs at law; that it conclusively appears that he intended to give to his surviving husbands or wives merely a life estate; that he dealt alike with widow and surviving husbands, and that he could not have intended that a son's widow who should marry and thereby terminate her life estate should at once become entitled to a large part of the fund at the expense of his own descendants. And it is urged that the same considerations apply with no less force to a construction which would divert, at any rate in part, the fund set aside for



heirs at law of his daughters to the estates of their deceased husbands who had happened to survive them, so that, after the decease of such husbands, his bounty would go to strangers in blood, perhaps not even known to him, although the only beneficiaries whom he had designated were the issue or heirs at law of his own children, whom he naturally would expect to be either his immediate descendants or near kinsmen. Accordingly, it is contended that he intended to determine indeed the heirs at law of each child at the time of such child's decease, but to exclude any surviving husband or wife from that class, and to restrict any benefit which they were to take to the life estates which were expressly given to them: See *Pierce v. Knight*, 182 Mass. 72, 64 N. E. 692; *Heard v. Read*, 169 Mass. 216, 47 N. E. 778; *Welch v. Brimmer*, 169 Mass. 204, 47 N. E. 699, and cases there cited.

The question is not free from difficulty; but upon the language of this will the arguments which have been stated do not seem to us to be convincing. It does not appear that the general scheme of the testator was, in all the contingencies which he contemplated, to limit his bounty to his own descendants. He was content, upon the death of any of his children without issue, that the share apportioned for the benefit of such child should go, not to his own heirs at law, but to those of the child. He must have had in mind that those heirs were to be ascertained at the <sup>323</sup> death of such child, and must have recognized the fact that it would be impossible to foretell who those heirs would be. Even under the limitation to the issue of his children it might well have happened that shortly after his own death one or more of the shares into which his residue was to be divided would have gone to entire strangers. If his son John had left issue, the remainder in one share would have vested in them, subject only to the life estate of their mother. If they had died before the remarriage of their mother, she would have been their heir under the statutes then in force: Gen. Stats., c. 91, sec. 1. In 1863, accordingly, if these not impossible events had occurred, one full share of the trust fund would have become the absolute property of Mrs. Thwing, and would pass upon her death to those who might be entitled then to claim under her, presumably entire strangers to the blood of the testator; and this within little more than two years after his own decease. The fact that similar results may fol-

low the limitation to his children's heirs at law will not tify us in applying by construction a restriction to these w which he did not choose himself to apply. We cannot o ride his plain words upon the strength of an imagined g eral intent which he has neither expressed nor manife implied, and which would be at variance with the langu which he has used. Accordingly, we are of opinion that surviving husbands of Mrs. Lucas and Mrs. Cowles, res tively, became entitled as heirs at law to the shares of t respective wives to the extent of five thousand dollars amount. Nor do we think it material whether either or b of these husbands have hitherto received anything from estates of their deceased wives. The bequests to the h at law of these children designate not only the persons v are to take, but also the amount and proportions in wh they are to take; that is, under Public Statutes, chapter section 1, the husband to the extent of five thousand doll and under Public Statutes, chapter 125, section 1, claus the surviving brothers and sisters and the issue of those v are dead to the rest of the share: See *Cummings v. C mings*, 146 Mass. 501, 16 N. E. 401; *Rand v. Sanger*, Mass. 124; *Holbrook v. Harrington*, 16 Gray, 102; *Dag v. Slack*, 8 Met. 450; *Lawrence v. Crane*, 158 Mass. 392, N. E. 605; *Proctor v. Clark*, 154 Mass. 45, 27 N. E. 673, L. R. A. 121; and *Lavery v. Egan*, 143 Mass. 389, 9 N. 747. The right of these husbands is established by the t that they are included under <sup>384</sup> the term "heirs at law" used by the testator. They take directly from the testa they do not inherit from their respective wives a share of estates in remainder held by the latter; and the cases *Watson v. Watson*, 150 Mass. 84, 22 N. E. 438, *Baker v. Ba* 167 Mass. 575, 46 N. E. 391, and *Hill v. Pike*, 174 Mass. 55 N. E. 324, relied upon by the defendants having inter adverse to theirs, are not applicable.

It remains to be determined whether the proceeds of estate originally held in the trust fund, but sold and chan into personal property by the trustees before April, 1898, accordance with the power given to them by the will, sho be treated as real estate. It is to be observed that the does not direct that the real estate be converted into perso but simply gives the trustees power to sell and convey and make new investments; and this has been already found to

a circumstance of weight in determining the construction of the words "heirs at law." If the conversion had been directed by the testator, or if he had contemplated the making of such a conversion before the taking effect of his final limitations, the proceeds of the real estate would be treated as personal property: *Lawrence v. Crane*, 158 Mass. 392, 33 N. E. 605; *Hammond v. Putnam*, 110 Mass. 232. But where, as here, there is a mere power to change investments, the fund resulting from a sale of real estate retains its original character until it reaches one who has the right to treat it as his own absolutely and for all purposes: *Hovey v. Dary*, 154 Mass. 7, 27 N. E. 659; *Holland v. Adams*, 3 Gray, 188, 191; *Holland v. Cruft*, 3 Gray, 162. Accordingly, we are of opinion that the proceeds of the realty originally forming part of the trust estate are to be treated as realty in making distribution of the trust fund until the final vesting of the right to them in parties ultimately entitled. Whether this can be done more conveniently by specifically following out the different investments which have been made, or, as has been suggested by counsel for one of the defendants, by having the share of any deceased issue or heir at law that is undisposed of by will go to his heirs and to his administrator in the ratio which the real estate belonging to the share originally bore to the personality, is a practical question with which we do not need to deal.

Mrs. Lucas died in 1885. Her heirs at law were her husband; <sup>285</sup> her surviving brother and sisters: Joseph Whittemore, Mrs. Cowles and Mrs. Gifford; the children of her deceased brother Thomas: Thomas Whittemore and George L. Whittemore; the children of her deceased brother Benjamin: John, Charles, Otis, Benjamin and Frank Whittemore; and the daughter of her deceased sister Mrs. Ruggles, Josephine P. Harrington. Out of the share of which the income was originally paid to Mrs. Lucas, accordingly, the sum of five thousand dollars is first to be paid to the executor of the will of her deceased husband. The residue of this share is to be divided into six parts. The first of these parts vested on the death of Mrs. Lucas, subject to the life estate of her husband, in the children of her brother Thomas. One-half of this part is now to go to George L. Whittemore; the other half part was finally vested in Thomas Whittemore the younger, and apparently passed by his will, upon his death

in 1890, to his widow, Winifred L. Whittemore; and upon her death intestate in 1898, the right to receive this half part passed to the defendant Dyer, the administrator of her estate and should now be paid to him accordingly. The second part is to be paid in equal shares to the children of Benjamin Whittemore; the third part to the daughter of Mrs. Ruggles. The fourth part became vested in Joseph Whittemore, and is now passed by his will and that of his widow to his son Thomas; and he is now entitled to receive this share. The fifth part became vested in Mrs. Cowles, and upon her death in 1895 was a part of her estate; and the plaintiffs must determine whether they can safely pay it over to the persons entitled as her heirs or distributees, or whether an administrator of her estate must be appointed: *Heard v. Read*, 169 Mass. 216, 47 N. E. 778. The sixth part vested in Mrs. Gifford and upon her death in 1898 passed to her children George Gifford and Anna E. Bowman, subject to the same considerations, as already stated.

Mrs. Cowles died on June 8, 1895. Her heirs at law were her husband; her surviving sister, Mrs. Gifford; the children of her deceased brothers, Thomas, Benjamin B. and Joseph; and the children of her deceased sister, Mrs. Ruggles. Her share, accordingly, became vested to the extent of five thousand dollars in her husband, John E. Cowles; one-fifth part of the residue in Mrs. Gifford; and one-fifth part in the children respectively above named; and payments should be made accordingly. It is unnecessary to go further into details, as the same principles are to be applied which have been fully stated in dealing with the case of Mrs. Lucas.

The plaintiffs are to be instructed that the share of which Joseph Whittemore originally received the income is now to go to his issue, and the shares of which the income was paid to Mrs. Lucas and Mrs. Cowles are to be divided among their respective legal heirs above stated.

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*The Rule against Perpetuities* is the subject of an extended note in *re Walkerly*, 49 Am. St. Rep. 117. For recent decisions on this question, see *Hill v. Gianelli*, 221 Ill. 286, 112 Am. St. Rep. 1; *Merrill v. American Baptist Missionary Union*, 73 N. H. 414, 42 Am. St. Rep. 632. Any suspension of the power of alienation based on lives in being is void, and that power is suspended where there are no persons in being by whom an absolute fee in possession can be conveyed: *Casgrain v. Hammond*, 134 Mich. 419, 104 Am. St. Rep. 610. The severability of perpetuities and forbidden trusts is discussed in the note to *Johnston's Estate*, 64 Am. St. Rep. 63.

**JUMP v. LEON.**

[192 Mass. 511, 78 N. E. 532.]

**COUNTERCLAIM, When Must Have Accrued Before the Commencement of the Action.**—If an action is brought on a promissory note in the name of an indorsee, and is, after his death, prosecuted by his administrator or executor, the defendant cannot have the benefit as a counterclaim or as an equitable defense of a note purchased after the commencement of the action. (pp. 265, 266.)

**NEGOTIABLE PAPER, Action in Favor of One not a Party in Interest.**—The holder of negotiable paper indorsed in blank of which he has the legal title, but in which he has no beneficial interest, may maintain, after maturity, a suit thereon against the maker, with the assent of the real owner, to whom the holder is responsible for the proceeds. (p. 266.)

**COUNTERCLAIM Where the Plaintiff Has not a Beneficial Interest.**—If an action is brought on a promissory note transferred to the plaintiff but in which he has no beneficial interest, the defendant may maintain a counterclaim against the person who is the beneficial owner of such note. (p. 266.)

**COUNTERCLAIM Against Notes Held in the Name of an Estate.**—If, after the bringing of an action on a promissory note by a person holding the legal title, but having no beneficial interest, the holder of the beneficial interest dies and his executor is appointed, the defendant cannot maintain a counterclaim on unmatured notes against such beneficial interest, though the estate is probably insolvent, if the executrix has not represented it to be insolvent and a year has not elapsed since his appointment. (pp. 267, 268.)

Contract on two promissory notes made by the defendant payable to his own order and indorsed in blank. The defense, besides a general denial, was that the notes were not owned by the plaintiff, but by one Bates, who died after the commencement of the action; that his estate was insolvent, and that the defendant should be permitted to apply against the plaintiff's notes, notes executed by the decedent Bates and purchased by the defendant after the commencement of the action. The trial court instructed the jury to find in favor of the plaintiff.

F. L. Norton, for the defendant.

W. H. Thorpe, for the plaintiff.

<sup>513</sup> **BRALEY, J.** Under Revised Laws, chapter 174, section 1, if an action on the promissory notes set out in the declaration had been brought by Bates in his own name, and after his death prosecuted by his executrix, the defendant by reason of the statute could not at law have had by way of

setoff the benefit of the counterclaim now pleaded as an equitable defense, although the notes held by him were purchased in the lifetime of the testator, because he did not acquire title until after the commencement of the action: *Cook v. Miller*, 5 Allen, 36; *Backus v. Spaulding*, 129 Mass. 234.

By repeated decisions beginning with *Little v. O'Brien*, 129 Mass. 423, it has been settled that the holder of negotiable paper <sup>514</sup> indorsed in blank to which he has no legal title, in which he has no beneficial interest, may maintain after maturity a suit thereon against the maker, with the assent of the real owner to whom, when recovered, he is accountable for the proceeds: *Whitten v. Hayden*, 9 Allen, 408; *Wheeler v. Johnson*, 97 Mass. 39; *National Pemberton Bank v. Porter*, 125 Mass. 333, 28 Am. Rep. 235; *Spofford v. North*, 126 Mass. 533; *Parks v. Smith*, 155 Mass. 26, 28 N. E. 10; *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. 9; *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11, 30 N. E. 1; *Haskell v. Avery*, 181 Mass. 106; *New England Trust Co. v. New York Belting etc. Co.*, 166 Mass. 42, 43 N. E. 928; *Farmer v. Hunt*, 190 Mass. 378, 77 N. E. 502. See *Towne v. Washburn*, 128 Mass. 517.

It is unnecessary, however, to decide whether the placing of the notes by Bates in the hands of an attorney at law with instructions to collect them, but with no further instructions, there being no disclosure of any facts on the evidence which rendered such a course on his part necessary or advisable, constituted a sufficient authorization for him to transfer them to the plaintiff for the purpose of having the action brought in his name; for the exceptions to the refusals to rule that on this reason, as neither the beneficial interest nor legal title had passed, the action could not be maintained have not been argued, and must be considered as waived.

This leaves as the only question whether the defendant has a right to an equitable setoff of the unmatured notes. Beyond the mere form in which the present action is cast is the substance of the contractual relations of the parties in interest even if the demands are unconnected, and in equity, or at law, the nominal difference of parties plaintiff, where the obligation in reality is for the sole use and benefit of a party named in the writ, but whose title is shown to be absolute. It is not a bar which prevents the other party from maintaining a claim in setoff: *Rev. Laws, c. 174, sec. 5; Commonwealth v.*

Phoenix Bank, 11 Met. 129; Tyler v. Boyce, 135 Mass. 558; Boyden v. Massachusetts Ins. Co., 153 Mass. 544, 27 N. E. 699; Stewart v. Coulter, 12 Serg. & R. 252, 14 Am. Dec. 680.

The notes held by the defendant, apparently as a purchaser for value and in good faith, matured on December 10, 1904, and the maker died on December 12, 1904, and a year not having <sup>515</sup> elapsed since the appointment of the executrix an action against her cannot be maintained until its expiration: Smith v. Hill, 8 Gray, 572; Rev. Laws, c. 141, sec. 1. No unreasonable delay in bringing an action, therefore, can be imputed, and from the evidence of the executrix it may be inferred that the estate is not solvent, and if before verdict it had been represented insolvent, the setoff claimed could have been enforced although the notes were not due at the date of the plaintiff's writ: Rev. Laws, c. 174, sec. 5; Bigelow v. Folger, 2 Met. 255; Phelps v. Rice, 10 Met. 128; Aldrich v. Campbell, 4 Gray, 284. The position, then, in which the defendant is placed is this: he holds valid outstanding promissory notes against an estate the solvency of which is admitted by the executrix to be doubtful, and is unable to enforce them independently, by reason of the special statute of limitations. The equity arising from such a situation is urged by him as a reason why he should be given the opportunity to try the question of the insolvency in fact of the estate, and upon this issue being found in his favor then to set off one debt against the other. In other jurisdictions this equitable right has been held to be created by the fact of insolvency of one of the parties where there are mutual debts similar as to their maturity to those shown in this case, and the relief given is not made dependent on a formal adjudication of the debtor as an insolvent, or a bankrupt: See Ford's Admr. v. Thornton, 3 Leigh, 695; Lindsay v. Jackson, 2 Paige, 581; American Bank v. Wall, 56 Me. 167; Gay v. Gay, 10 Paige, 369; Levy v. Steinbach, 43 Md. 212; Twigg v. Hopkins, 85 Md. 301, 37 Atl. 24; Goodwin v. Keney, 49 Conn. 563; Stewart v. Coulter, 12 Serg. & R. 252, 14 Am. Dec. 680; Smith v. Felton, 43 N. Y. 419; Nashville Trust Co. v. Fourth Nat. Bank, 91 Tenn. 336, 8 S. W. 822, 15 L. R. A. 710; Ex parte Stephens, 11 Ves. 24; Williams v. Davies, 2 Sim. 461; Agra Bank v. Hoffman, 34 L. J., N. S., Ch. 285; Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. Rep. 648, 30 L. ed. 707; Carr v. Hamilton, 129 U. S. 252, 9 Sup. Ct. Rep.

295, 32 L. ed. 669; *Scott v. Armstrong*, 146 U. S. 409, 1 Sup. Ct. Rep. 148, 36 L. ed. 1059; *North Chicago Rolling Mill Co. v. St. Louis Ore etc. Co.*, 152 U. S. 596, 14 Sup. Ct. Rep. 710, 38 L. ed. 565; *Camden Nat. Bank v. Green*, 1 Stew. 546, 17 Atl. 689, and note; *In re Hatch*, 155 N. Y. 40, 50 N. E. 49, 40 L. R. A. 664.

But in *Spaulding v. Backus*, 122 Mass. 553, 23 Am. Rep. 391, where the doctrine of equitable setoff was fully considered, with a review of some of the earlier authorities, it was said "that a party, <sup>516</sup> whose debt is not due, has no equitable claim to have it set off against a debt of his own, already due, in the hands of a party who is insolvent," and hence in those of his executor or administrator, where neither the debtor nor the estate has been adjudicated insolvent, and the doctrine was approved and followed in *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, 67 N. E. 655. The rule established by these cases, so far as they relate to this question, is that if a decree had been passed by the probate court declaring the estate of Bates insolvent, this defense would have been immediately available, but as the executrix has not chosen to take such action, the fact of actual insolvency cannot be shown under Revised Laws, chapter 173, section 28, permitting an equitable defense which entitles a defendant to be unconditionally relieved against either the claim, or the judgment, by any form of appropriate relief recognized by a court of equity: *Barton v. Radclyffe*, 149 Mass. 275, 21 N. E. 374; *New York etc. R. R. v. Martin*, 158 Mass. 313, 33 N. E. 578; *Nash v. D'Arey*, 183 Mass. 30, 66 N. E. 606.

But it would be unfortunate if the defendant was finally left without any remedy which a court in the exercise of its sound discretion might grant. If the plaintiff obtained judgment, and then instead of taking out execution brought suit on the exemption of the executrix having expired, and the defendant's notes having matured, they could be set off under Revised Laws, chapter 174, section 5. It is suggested that as this section applies only to debts which may be put in suit, if the defendant recovered judgment against the estate by reason of the diversity of parties, such judgments would not be a subject of setoff. The court will look at substance instead of form for the purpose of administering justice, and in *Barrett v. Barrett*, 8 Pick. 342, it was decided that judgment in favor of the judge of probate in a suit on a probat



bond could be set off against a judgment recovered by the executor in his individual capacity against the legatee for whose benefit the first suit had been instituted. Nor is it requisite that the name of the real party in interest should appear in the record, as this may be shown by oral evidence, and when established a setoff follows with the same effect as if the adverse party had been disclosed by the recitals in the judgment: *Sheldon v. Kendall*, 7 Cush. 217. See *Fiske v. Steele*, 152 Mass. 260, 25 N. E. 291; *Tilton v. Goodwin*, 183 Mass. 236, 66 N. E. 802. To afford this relief courts, proceeding <sup>517</sup> according to the common law with jurisdiction of the subject matter and of the parties, have continued cases after verdict until a defendant could obtain judgment on his claim which for any sufficient reason could not have been pleaded in the action, so that ultimately such setoff could be made: *Dennie v. Elliott*, 2 H. Black. 587; *Barker v. Braham*, 2 W. Black. 869; *Hendrickson v. Brown*, 39 N. J. L. 239; *Wolcott v. Jones*, 4 Allen, 367; *Ames v. Bates*, 119 Mass. 397; *Chipman v. Fowle*, 130 Mass. 352. See *McLauthlin v. Smith*, 176 Mass. 46, 57 N. E. 216.

It will be open to the defendant by a motion in the superior court for a continuance for judgment to obtain suitable relief, but if such action is not taken, or relief is not granted, then according to the terms of the report, as no error of law is found at the trial, the order must be judgment for the plaintiff on the verdict.

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*The Right of Setoff after insolvency* is the subject of a note to *St. Paul etc. Trust Co. v. Leck*, 47 Am. St. Rep. 578; and setting off one judgment against another is discussed in the recent note to *Coonan v. Loewenthal*, 109 Am. St. Rep. 137. A court of equity will take cognizance of cross-claims between litigants, though wholly disconnected and wanting in mutuality, and set off one against the other, whenever it becomes necessary to effect a clear equity and prevent irremediable injustice: *Porter v. Roseman*, 165 Ind. 255, 112 Am. St. Rep. 222. One indebted to a bank may purchase a claim due by it, and use such claim as a setoff, to the extent of concurrence of the demands, when sued on the debt which he himself owes. And the right to purchase claims to use as setoffs against a corporation continues up to the time of the filing of a petition for the appointment of a receiver, although the purchaser knows of the insolvency of the concern: *Nix v. Ellis*, 118 Ga. 345, 98 Am. St. Rep. 111. On what demands may be the subject of a setoff, see the note to *Gregg v. James*, 12 Am. Dec. 152.

# BAILEY v. NEW BEDFORD INSTITUTION FOR SAVINGS.

[192 Mass. 564, 78 N. E. 648.]

**GIFT, Necessity for Delivery and Acceptance.**—Where moneys are on deposit, to pass the property by a gift, there must be a delivery to and an acceptance by the donee, or something which is equivalent thereto. This rule applies to a deposit in a savings bank in the name or as trustee for another. (pp. 270, 271.)

**GIFT of Moneys on Deposit, When not Perfect.**—If one causes moneys to be deposited in a bank in his own name "in trust for E. who is his nephew and at the time single, a declaration declaring that no trust exists and that the deposit is to be payable to her or her order during her life and after her death to E., and makes a statement showing that she remembers E. and wants him to have the money there deposited, but retains the book in her own possession until after her death, she having made a will making no provision for E., the title to such moneys does not vest in E. (p. 271.)

A. Auger, for the plaintiff.

F. A. Milliken, for the claimant.

<sup>568</sup> KNOWLTON, C. J. The money on deposit in the savings bank was originally the property of the testatrix and there is no doubt that it remained hers up to the time of her death, unless there was a perfected gift of it to her son, Edward B. C. Bailey in her lifetime. It is clear that the making of a deposit of it in her name, as trustee for him, did not deprive her of her ownership and control of it. The statement signed by her at the time of making the deposit implies that it remained her property, and subject to her control, although it indicates an intention on her part that so much, if any, of the deposit as she allowed to remain <sup>569</sup> there to the time of her death should become his property. But she could not pass the title to the property after her death by such a deposit or by such a statement. Unless it passed in her lifetime, it did not pass at all. To pass property by a gift there must be a delivery of it to the donee, and an acceptance of it by him, or something which is equivalent to such a delivery and acceptance. This has been decided in many cases in which the question has arisen in reference to a deposit in a savings bank in the name of another, or as a trustee for another. In *Brabrook v. Boston Five Cents Savings Bank*, 104 Mass. 228, 6 Am. Rep. 222, Mr. Justice Wells said: "There must be some act of delivery out of the possession of the donor, for the purpose and with the intent that t

title shall thereby pass." "If the act of transfer be complete on the part of the donor, subsequent acceptance by the donee before revocation will be sufficient." In *Scrivens v. North Easton Savings Bank*, 166 Mass. 255, 44 N. E. 255, it is held that, in addition to what was written in the bank-book, "The testator must have indicated to the plaintiff in some form of language that the deposit then belonged to him, although he could not have it until his father's death, and that this was assented to by him." In the opinion in *Alger v. North End Savings Bank*, 146 Mass. 418, 4 Am. St. Rep. 331, 15 N. E. 916, we find similar language. Other cases of like import are *Clark v. Clark*, 108 Mass. 522; *Ide v. Pierce*, 134 Mass. 260; *Nutt v. Morse*, 142 Mass. 1, 6 N. E. 763; *Sherman v. New Bedford Five Cents Savings Bank*, 138 Mass. 581; *Booth v. Bristol County Savings Bank*, 162 Mass. 455, 38 N. E. 1120; *Welch v. Henshaw*, 170 Mass. 409, 64 Am. St. Rep. 309, 49 N. E. 659; *Cleveland v. Hampden Savings Bank*, 182 Mass. 110, 65 N. E. 27; *McMahon v. Lawler*, 190 Mass. 343, 77 N. E. 489.

In the present case, although the testimony tends to show an intention of the testatrix that the boy Edward should have this money after her death, there is no evidence of a delivery and acceptance of a gift of it in her lifetime, or of anything tantamount to a delivery and acceptance. The property, therefore, remained hers so long as she lived, and passed to her executor after her death.

Judgment on the verdict.

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*To Constitute a Gift*, there must be an intention to give, a delivery, actual or constructive of the thing given, and an acceptance, express or implied: *Waite v. Grubbe*, 43 Or. 406, 99 Am. St. Rep. 764, and cases cited in the cross-reference note thereto. The delivery may be constructive or symbolical: *Waite v. Grubbe*, 43 Or. 406, 99 Am. St. Rep. 764; *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004; and the acceptance may be presumed: *Sparks v. Hurly*, 208 Pa. 166, 101 Am. St. Rep. 926. But to consummate the gift, the donor must part with all dominion or control over the thing given: *Stevenson v. Earl*, 65 N. J. Eq. 721, 103 Am. St. Rep. 790; *Shugart v. Shugart*, 111 Tenn. 179, 102 Am. St. Rep. 777. For the application of these principles to gifts of bank deposits, see *Wipfler v. Detroit Pattern Works*, 140 Mich. 677, 112 Am. St. Rep. 430; *Winslow v. McHenry*, 93 Minn. 507, 106 Am. St. Rep. 448; *Stevenson v. Earl*, 65 N. J. Eq. 721, 103 Am. St. Rep. 790; *Shugart v. Shugart*, 111 Tenn. 179, 102 Am. St. Rep. 777; *Matter of Barefield*, 177 N. Y. 387, 101 Am. St. Rep. 814.

# PICKETT v. WALSH.

[192 Mass. 572, 78 N. E. 753.]

**LABOR UNIONS, General Right to Form, and to Strike.** Laborers have the right to organize into labor unions to promote their welfare, and a labor union has a general right to strike (p. 279.)

**A LABOR UNION is Limited in What It can Lawfully do.** the existence of the right in every other citizen to pursue his calling as he thinks best. (p. 280.)

**LABOR UNIONS AND STRIKES.—The Test of What is Lawful for an Individual** is not always the test of what is lawful for a combination of individuals. There are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do. (p. 282.)

**LABOR UNIONS—Unlawful Combinations.**—The members of a labor union cannot by a strike refuse to work with other workmen for an arbitrary cause. (p. 281.)

**LABOR UNION, Strike by to Compel Discharge of Persons Belonging to the Union and to Obtain Employment for Themselves.** A strike by bricklayers and masons to refuse to lay brick and stone where the work of pointing is given to others, and thereby to compel such work to be given to such bricklayers and masons, is not unlawful. (pp. 282, 283.)

**STRIKE, When Unlawful.—A Strike by a Labor Union Against A, with Whom It Has No Dispute, Because He Works for B, with Whom It Has a Dispute,** for the purpose of forcing A to force B to yield to the strikers' demand, is not justifiable. Organized labor has no right to coercion and compulsion is limited to strikes against persons with whom the organization has a dispute. (pp. 286, 287.)

**LABOR UNIONS, Liability of Members of.**—A defendant is liable for an intentional and unjustifiable interference with the business on the part of the plaintiff of his calling, whether it be of labor or of business. (p. 287.)

**PRACTICE—Unincorporated Labor Union.**—An unincorporated labor union cannot be made a party defendant. (p. 289.)

E. W. Mansfield, for the defendants.

S. J. Elder and E. A. Whitman, for the plaintiffs.

**573 LORING, J.** This suit in equity comes before us on an appeal from a final decree, where the evidence was taken by a commissioner and where no findings of fact were made in the lower court.

The bill was brought to enjoin the defendants from combining and conspiring to interfere with the plaintiffs in pursuing their trade of brick and stone pointers. The purpose of the bill as **574** stated in the prayers for relief was to enjoin the defendants (1) from combining and conspiring

any way to compel L. P. Soule & Son Company, or any other person, firm or corporation, by force, threats, intimidation or coercion, to discharge the complainants in the bill of complaint. to wit: Robert H. Pickett, Charles A. Pickett, Thomas J. Lally and Walter H. Wilkins, or to refrain from further employing them in and about their trade and occupation; (2) from combining and conspiring to compel the owners of the so-called Ford building on Ashburton place in the city of Boston to break or decline to carry out their said contract with the complainant Robert H. Pickett; and (3) from combining and conspiring to interfere with the said complainants, or any of them, in the practice of their trade and occupation, or to prevent them from obtaining further employment thereat.

The defendants were the officers of two unincorporated bricklayers' unions, to wit, Unions No. 3 and No. 27, and of one stone masons' union, to wit, Union No. 9. The plaintiffs also undertook to make each one of the three unincorporated unions parties defendant. The Bricklayers' Union No. 27 seems, from the evidence, not to have been concerned in the matters in dispute. For this reason we shall not refer to it again except to show later on that there is no evidence that it took part in the matters here in question. The individual defendants were one Driscoll, the walking delegate of the Bricklayers' Union No. 3, one Walsh, the walking delegate of the Stone Masons' Union No. 9, and other persons who were officers of those two unions.

It appears from the evidence that the trade of brick and stone pointing is a trade which, in the neighborhood of the city of Boston, at any rate, has been carried on to some extent as a separate trade for nearly, if not quite, one hundred years. It further appears that there are now some forty-five men engaged in that trade in the vicinity of that city.

The trade of a brick or a stone pointer consists in going over a building (generally when it is first erected) to clean it and to put a finish on the mortar of the joints. Apparently in the city of Worcester, and to some extent in the city of Boston, this work of pointing is done by bricklayers and stone masons.

The dispute which gave rise to the suit now before us had its <sup>575</sup> origin in a set of rules adopted in January, 1905, by the Bricklayers' and Masons' International Union of Am-

erica, to which the two unions here in question were subordinate. This set of rules contained a provision that bricklaying masonry should consist (inter alia) of "all pointing and cleaning brick walls," and that stone masonry should consist (inter alia) of the "cleaning and pointing of stone work." The practical working of the principles of brick and stone masonry, as defined in these rules, was left to the subordinate unions.

By the constitution, by-laws, and rules of order of the Bricklayers' Union No. 3, it is provided that members shall not accept employment "where a difficulty exists in consequence of questions involving the rules which govern the union," and that any member violating a law of the union shall, on conviction, "be reprimanded, suspended or fined at the discretion of the union." No similar provision appears in the extract from the constitution of the Stone Masons' Union which was in evidence, but it is not a violent assumption from the action of the masons and from the testimony of Walsh, the walking delegate of the Stone Masons' Union, that the members of the Masons' Union stood on the same footing as the members of the Bricklayers' Union in this respect.

In other words, the make-up of the two unions was such that any member of a subordinate union (which had adopted a working rule containing in substance the provisions of the working rules of the International Union as to cleaning and pointing buildings) who continued to work on a job which a pointer was at work was liable to be reprimanded, fined or suspended.

This brings us to the action taken by the unions here in question.

There was an executive committee of the two unions. On July 28, 1905, this executive committee voted "that beginning September 18, 1905, no member of the Bricklayers' and Masons' unions of Boston and vicinity will work on any building where the contractor will not agree to have the pointing done by bricklayers or masons."

This action of the executive committee was formally adopted by the Bricklayers' Union No. 3, and seems to have been informally adopted by the Stone Masons' Union No. 1. In pursuance <sup>576</sup> thereof the following circular letter was issued: "The Bricklayers' and Masons' Unions of Boston and vicinity have voted that no bricklayer or mason w

work for any firm or contractor who will not employ bricklayers or masons to do the pointing of brick, terra cotta, and stone masonry. This action to go into effect September 18, 1905."

In September, 1905, L. D. Willcutt & Son, as general contractors, were erecting (among other buildings) a stone building on the corner of Massachusetts avenue and Boylston street in Boston. On the eighteenth day of that month, Mr. L. D. Willcutt, of that firm, was notified that if he did not discharge the pointers who were working for his firm in pointing that building, all the masons and bricklayers working for his firm on other buildings in Boston (all of whom were union men) would strike. Thereupon he suspended the work which was being done by the pointers on the building on the corner of Massachusetts avenue and Boylston street. This evidence was admitted to show that there was a general scheme that where pointing was given to anyone beside union bricklayers and stone masons there would be a strike.

On November 13, 1905, the defendant Walsh, the walking delegate of the Stone Masons' Union No. 9, and the defendant Driscoll, the walking delegate of the Bricklayers' Union No. 3, came to the Ford building, for which the corporation of L. P. Soule & Son Company were the general contractors, and found that the cleaning and the pointing of that building were being done under a contract between the owners of the building and Robert H. Pickett, one of the plaintiffs here. They then went to a brick building which was being erected by the L. P. Soule & Son Company as contractors, a cold storage warehouse on Eastern avenue, and there Driscoll notified the men that the pointing of the Ford building was being done by pointers. In consequence, all the bricklayers employed by the L. P. Soule & Son Company on the cold storage building, fifty in all, being union men, struck work on that or the next day. The next day, November 14th, Walsh went to a stone building which was being erected by the same corporation for the International Trust Company on the corner of Arch street and Devonshire street, and told the workmen there of the pointing on the Ford <sup>577</sup> building; whereupon all the stone masons working there, five or six in all, being union men, struck work.

This bill was filed in the superior court on November 21, 1905. It seems to have come on for hearing on December 5,

1905. As we have said, the evidence was taken by a commissioner, a final decree in favor of the plaintiffs on all the grounds was made on December 11th, without any special findings of fact, and the case is here on appeal from the decree.

It appeared from the testimony of Parker F. Soule (an officer of the L. P. Soule & Son Company) that it was cheaper to make a contract with pointers for the work of pointing and cleaning than to employ stone masons or bricklayers to do that work. It appeared from other evidence that the wages of a bricklayer or stone mason were fifty-five cents an hour, while pointers are paid three dollars for a day of eight hours, or thirty-seven and one-half cents an hour. It further appeared from Mr. Soule's testimony that he preferred to give the work to the pointers because in cleaning a building acid has to be used, and when the acid is used to excess, stains are caused which in some instances it is impossible to "get out"; and that he did not think that the bricklayers and stone masons were competent to use these acids. He also preferred to give the work to the pointers because the work which is done by the pointers is usually done by contract, in which case the general contractor who employs the pointers is relieved from responsibility on account of accidents which may occur because of the fact that the work is done on a swinging stage, at times at great heights. Again, it appeared from the evidence that the L. P. Soule & Son Company were not the only contractors who thought that they got better work at a smaller cost with less liability by making a contract with stone pointers for the doing of this work than by employing stone masons and bricklayers to do it.

All this was explained to the walking delegate of the Bricklayers' Union here in question at an interview between Mr. Soule and the walking delegate of that union held within two days of the strike. It also appeared that at the interview the delegate told Mr. Soule that, while it had been against the rules of the union that any member should take piece work, the taking of piece work recently had been allowed; whereupon Mr. Soule <sup>578</sup> told him that "if he had any members of his union who were reliable men, whom he could have confidence enough in to let a contract to, he would give prices as low, . . . he would have no trou-



in getting all the stone pointing there was going." No offer to make a contract on these terms was made, and on the evidence it must be assumed that there was nothing in this statement of the defendant Walsh.

It further appeared from the evidence that the brick and stone pointers of Boston applied to the Building Trades Council for a charter. It is stated in the record of the Brick Masons' Union No. 3, that "the said pointers about a year ago applied to the A. F. of L. for a charter, which was denied them, the American Federation of Labor taking the stand that brick and stone pointing was a part of the bricklayers' and masons' trade." On September 11, 1905, the Brick Masons' Union No. 3 voted to "file a protest to the B. T. C. against their granting a charter to the brick and stone pointers of Boston," and on September 18th, it was voted "that this committee [sic] send communication to B. T. C., requesting that body not to grant a charter to the so-called brick and stone pointers." It was admitted that the men engaged in the business of brick and stone pointers were not qualified for the business of bricklayers and stone masons.

There was evidence that at the interview between Driscoll and Mr. Willcutt, Mr. Willcutt told Driscoll that he did not believe that, when there were twelve hundred men in the union and thirty pointers outside, all this fuss was being made to get the pointers' work for the union men; that he thought it was "simply a question of dictation to us"; and on Mr. Willcutt's asking him (Driscoll), "Do you really want it, or do you want to drive the men out of business?" Driscoll smiled, and said: "That is a charitable way of looking at it."

There seems to be three causes of action upheld by the decree.

In the first place, Robert H. Pickett, one of the plaintiffs, had a contract with the owners of the Ford building and was at work under it when the defendants struck. He seeks protection from a strike on L. P. Soule & Son Company to force the owners of the Ford building to give this work to the unions <sup>579</sup> and to take it away from him. Except for the fact of this contract, in which the plaintiff Robert H. Pickett alone was concerned, the first and second causes of action are alike.

The second cause of action consists in the effort of all plaintiffs to be protected from being discharged or not employed by the L. P. Soule & Son Company, because the defendants struck work for that corporation so long as the corporation worked on a building on which Robert Pickett was employed by the owners of that building.

Finally, the plaintiffs sought to be protected against a strike by the defendants in order to get the work of pointing for the members of their unions.

No objection has been taken to the bill on the ground of multifariousness. We therefore shall consider all the causes of action.

We will consider first the last of the three causes of action.

The question, so far as the third cause of action (apart from a question of fact which we will deal with later on), is whether the defendant unions have a right to strike for the purpose for which they struck; or, to put it more accurately and more narrowly, it is this: Is a union of bricklayers and stone masons justified in striking to force a contractor to employ them by the day to do cleaning and pointing at higher wages than pointers are paid, where the contractors wish to make contracts with the pointers for such work to be done by the piece, because they think they get better work at less cost with no liability for accidents, and where the pointers wish to make contracts for such work with the contractors on terms satisfactory to themselves?

In other words, we have to deal with one of the great pressing questions growing out of the existence of the powerful combinations, sometimes of capital and sometimes of labor, which have been instituted in recent years, where the actions come into conflict with the interests of individuals. The combination in the case at bar is a combination of workmen, and the conflict is between a labor union on the one hand, and several unorganized laborers on the other hand.

It is only in recent years that these great and powerful combinations have made their appearance, and the limit to which <sup>580</sup> they may go in enforcing their demands are not yet settled.

It is settled, however, that laborers have a right to organize as labor unions to promote their welfare.

Further, there is no question of the general right of a labor union to strike.

On the other hand, it is settled that some strikes by labor unions are illegal. It was held in *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, that a strike by the members of a labor union was illegal when set on foot to force their employer to pay a fine imposed upon him by the union, of which he was not a member, for not giving the union all his work. To the same effect, see *March v. Bricklayers etc.* Union No. 1, 79 Conn. 7. Again, it was held in *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339, that a labor union could not force other workmen to join it by refusing to work if workmen were employed who were not members of that union. To the same effect, see *Erdman v. Mitchell*, 207 Pa. 79, 99 Am. St. Rep. 783, 56 Atl. 327, 63 L. R. A. 534; *O'Brien v. People*, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108; *Loewe v. California State Federation of Labor*, 139 Fed. 71. And see, in this connection, *Giblan v. National Amalgamated Labourers' Union*, [1903] 2 K. B. 600.

When and for what end this power of coercion and compulsion commonly known as a strike may be legally used is the question which this case calls upon us to decide. In the present state of the authorities it becomes necessary to consider the general principles governing labor unions and strikes by labor unions.

The right of laborers to organize unions and to utilize such organizations by instituting a strike is an exercise of the common-law right of every citizen to pursue his calling, whether of labor or business, as he in his judgment thinks fit. It is pointed out in *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, that in the earlier days of the colony the government undertook to control the conduct of labor and business to some extent, but that later this policy of regulation was abandoned and all citizens were left free to pursue their calling, whether of labor or business, as seemed to them best. This common-law right was raised to the dignity of a constitutional right by being incorporated in the constitution of the commonwealth. So far as the question now before us goes, it is of no consequence whether <sup>581</sup> the right to pursue one's calling (whether it be of labor or of

business) is a common-law right or a constitutional right since the violation of it here complained of is on the part of individuals and not on the part of the legislature. What of consequence here is that such a right exists. In article of the Declaration of Rights it is declared that "All men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of . . . acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." It is in the exercise of this right that laborers can legally combine together in what are called labor unions.

This right of one or more citizens to pursue his or their calling as he or they see fit is limited by the existence of the same right in all other citizens. The right and the restriction are accurately stated by Sir William Erle in his book *Trade Unions* in these words: "Every person has a right under the law, as between him and his fellow-subjects, to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others"; cited by this court in *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. H. 1011, 57 L. R. A. 339.

We now have arrived at the point where a labor union, being an organization brought about by the exercise on the part of its members of the right of every citizen to pursue his calling as he thinks best, is limited in what it can do by the existence of the same right in each and every other citizen to pursue his and their calling as he or they think best.

In addition to the limitation thus put on labor unions there is a fact which puts a further limitation on what a labor union can legally do. That is the increase of power which a combination of citizens has over the individual citizen. Take, for example, the power of a labor union to compel, by a strike, compliance with its demands. Speaking generally, a strike, to be successful, means not only coercion and compulsion, but coercion and compulsion which, for practical purposes, are irresistible. A successful strike

laborers means, in many if not <sup>583</sup> in most cases, that for practical purposes the strikers have such a control of the labor which the employer must have that he has to yield to their demands. A single individual may well be left to take his chances in a struggle with another individual. But in a struggle with a number of persons combined together to fight an individual the individual's chance is small, if it exists at all. It is plain that a strike by a combination of persons has a power of coercion which an individual does not have.

The result of this greater power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals; or to state it in another way, there are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do. Take, for example, the example put in *Allen v. Flood*, [1898] App. Cas. 1, 165, of a butler refusing to renew a contract for services, because the cook was personally distasteful to him, whereupon, in order to secure the services of the butler, the master refrains from re-engaging the cook whose term of service also had expired. We have no doubt that it is within the legal rights of a single person to refuse to work with another for the reason that the other person is distasteful to him, or for any other reason, however arbitrary. But it is established in this commonwealth that it is not legal (even where he wishes to do so) for an employer to agree with a union to discharge a nonunion workman for an arbitrary cause at the request of the union: *Berry v. Donovan*, 188 Mass. 353, 108 Am. St. Rep. 499, 74 N. E. 603. A fortiori the members of a labor union cannot, by a strike, refuse to work with another workman for an arbitrary cause. For the general proposition that what is lawful for an individual is not necessarily lawful for a combination of individuals, see *Quinn v. Leathem*, [1901] App. Cas. 495; *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598; on appeal, [1892] App. Cas. 25; *Gregory v. Brunswick*, 6 Man. & G. 205; on appeal, 3 Com. B. 481. It is in effect concluded by *Platt v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339.

These being the general principles, we are brought to the question of the legality of the strike in the case at bar,

namely, a strike of bricklayers and masons to get the work of pointing, <sup>583</sup> or, to put it more accurately, a combination by the defendants, who are bricklayers and masons, to refuse to lay bricks and stone where the pointing of them is given to others. The defendants, in effect, say, "We will do the work of pointing the bricks and stone laid by us, and you must give us all or none of the work."

The case is one of competition between the defendant unions and the individual plaintiffs for the work of pointing. The work of pointing for which these two sets of workmen are competing is work which the contractors are obliged to have. One peculiarity of the case, therefore, is that the fight here is necessarily a triangular one. It necessarily involves the two sets of competing workmen and the contractor, and is not confined to the two parties to the contract, as is the case where workmen strike to get better wages from their employer or other conditions which are better for them. In this respect the case is like *Mosley v. Steamship Co.*, 23 Q. B. D. 598; on appeal, [1892] App. Cas. 25.

The right which the defendant unions claim to exercise in carrying their point in the course of this competition is to secure a trade advantage, namely, that they have labor which the contractors want, or, if you please, cannot get elsewhere, and they insist upon using this trade advantage to get additional work, namely, the work of pointing the bricks and stone which they lay. It is somewhat like the advantage which the owner of back land has when he has bought the front lot. He is not bound to sell them separately. To be sure, the right of an individual owner to sell both or none is not decisive of the right of a labor union to combine and refuse to lay bricks or stone unless they are given the job of pointing the bricks laid by them. There are things which an individual can do which a combination of individuals cannot do. But having regard to the right on which the defendants' organization as a labor union rests, the correlation of duty owed by it to others, and the limitation of the defendants' rights coming from the increased power of organization, we are of opinion that it was within the rights of these unions to compete for the work of doing the pointing, and, in the exercise of their right of competition, to refuse to lay bricks and set stone unless they were given the work

of pointing them when laid. <sup>584</sup> See, in this connection, *Plant v. Woods*, 176 Mass. 492, 77 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339; *Berry v. Donovan*, 188 Mass. 353, 108 Am. St. Rep. 499, 74 N. E. 603.

The result to which that conclusion brings us in the case at bar ought not to be passed by without consideration.

The result is harsh on the contractors, who prefer to give the work to the pointers because (1) the pointers do it by contract (in which case the contractors escape the liability incident to the relation of employer and employé); because (2) the contractors think that the pointers do the work better, and if not well done, the buildings may be permanently injured by acid; and finally (3) because they get from the pointers better work with less liability at a smaller cost. Again, so far as the pointers (who cannot lay brick or stone) are concerned, the result is disastrous. But all that the labor unions have done is to say, "You must employ us for all the work or none of it." They have not said that, "If you employ the pointers you must pay us a fine," as they did in *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287. They have not undertaken to forbid the contractors employing pointers, as they did in *Plant v. Woods*, 176 Mass. 492, 77 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339. So far as the labor unions are concerned the contractors can employ pointers if they choose, but if the contractors choose to give the work of pointing the bricks and stones to others the unions take the stand that the contractors will have to get some one else to lay them. The effect of this in the case at bar appears to be that the contractors are forced, against their will, to give the work of pointing to the masons and bricklayers. But the fact that the contractors are forced to do what they do not want to do is not decisive of the legality of the labor union's acts. That is true wherever a strike is successful. The contractors doubtless would have liked it better if there had been no competition between the bricklayers' and masons' unions on the one hand, and the individual pointers on the other hand. But there is competition. There being competition, they prefer the course they have taken. They prefer to give all the work to the unions rather than get nonunion men to lay bricks and stone to be pointed by the plaintiffs.

Further, the effect of complying with the labor union demands apparently will be the destruction of the plaintiff's business. But the fact that the business of a plaintiff is destroyed <sup>585</sup> by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of the acts. It was well said by Hammond, J., in *Martell v. White*, 185 Mass. 255, 102 Am. St. Rep. 341, 19 N. E. 1085, 64 L. R. A. 260, in regard of the right of a citizen to pursue his business without interference by a combination to destroy it: "Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often shameful and sometimes deadly."

We cannot say on the evidence that pointing is something foreign to the trade of a bricklayer or a stone mason and therefore something which a union of bricklayers and stone masons have no right to compete for or insist upon, and to bring the case within *Carew v. Rutherford*, 106 Mass. 1, 12 Am. Rep. 287, *March v. Bricklayers' etc. Union* No. 1, 19 Conn. 7, 63 Atl. 91, and *Giblan v. National Amalgamated Labourers' Union*, [1903] 2 K. B. 600. On the contrary, the evidence shows that in Boston the pointing is done to some extent by bricklayers and stone masons, and there is no evidence that the trade of pointers exists outside that city.

The protest of the defendant unions against the plaintiffs being allowed to organize a pointers' union is not an act of oppression. It is not like the refusal of the union in *Quinn v. Leathem*, [1901] App. Cas. 495, to work with the nonunion men or to admit the nonunion men to their union. The defendants' unions are not shown to be unwilling to admit plaintiffs to membership if they are qualified as bricklayers or stone masons. But the difficulty is that the plaintiffs are not so qualified. They are not bricklayers or masons. The unions have a right to determine what kind of work shall compose the union, and to insist that pointing shall not be a separate trade so far as union work is concerned. They have not undertaken to say that the contractors shall not treat the two trades as distinct. What they insist upon is that if the contractors employ them they shall employ them to do both kinds of work.

The application of the right of the defendant unions, who are composed of bricklayers and stone masons, to comp



with the individual plaintiffs, who can do nothing but pointing (as we have said), is, in the case at bar, disastrous to the pointers and hard on the contractors. But this is not the first case where the <sup>586</sup> exercise of the right of competition ends in such a result. The case at bar is an instance where the evils which are or may be incident to competition bear very harshly upon those interested, but in spite of such evils competition is necessary to the welfare of the community.

So far as previous decisions go, the case which comes nearest to the case at bar in the kind of question raised is that of *Allen v. Flood*, [1898] App. Cas. 1. In that case there was a dispute between shipwrights and boiler-makers as to iron work in ship-building. It was stated by some of the judges (see for example Lord Watson at page 99; Lord Herschell at page 129; Lord Macnaghten at page 151) that it was lawful for either to strike to get this work from the other. But the decision in *Allen v. Flood*, [1898] App. Cas. 1, went off on another ground: See Lord Halsbury, C., in *Quinn v. Leathem*, [1901] App. Cas. 495.

The defendants have urged upon us the case of *Bowen v. Matheson*, 14 Allen, 499. But although so far as the third cause of action here in question is concerned we have reached the result arrived at in that case, we have reached it on other grounds. That case went up on demurrer and the ground on which that case was decided was that on the allegations in the declaration it was to be treated as one of the class of cases of which *Parker v. Huntington*, 2 Gray, 124, is the leading case in this commonwealth, and *Bilafsky v. Conveyancers Title Ins. Co.*, 192 Mass. 504, 78 N. E. 534, is the last, namely, cases in which the allegations of conspiracy are not allegations of a tortious act in and of themselves, but are simply allegations that the defendants joined in doing acts otherwise alleged to be tortious. It is not now material to inquire whether *Bowen v. Matheson*, 14 Allen, 499, should or should not have been held to belong to this class of cases, for it is settled in this commonwealth, as we have already said, that the line within which a combination of individuals like a labor union must confine its actions is drawn much closer than in case of the same individuals acting separately.

The plaintiffs have asked us to find on the evidence that the actions of the unions and of the business agents and

other officers and the members in compelling L. P. Soule & Son Company to discharge "the plaintiffs was due in part to a desire to further and protect their own interests, what they conceived <sup>587</sup> to be such, but more to a reckless and wanton, if not malicious, disregard of the rights of the plaintiffs and of others engaged in the business of pointing and to a determination to force them out of business and thereby deprive them of their accustomed means of earning a livelihood."

We find on the evidence that the plaintiffs have not made out the fact that the defendants' action was due to a reckless and wanton, if not malicious, disregard of the rights of the plaintiffs, and of others engaged in the business of pointing. Under these circumstances we do not find it necessary to decide what would have been the result had we found that fact: See in this connection, *Bowen, L. J., Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598.

It follows that the third clause of the decree, which allows the third prayer of the bill, must be stricken out.

This brings us to the legality of the strike by the union bricklayers and masons employed by the L. P. Soule & Son Company on other buildings, because that corporation was doing work on a building on which work was being done by pointers employed not by the L. P. Soule & Son Company but by the owners of the building.

That strike has an element in it like that in a sympathetic strike, in a boycott and in a blacklisting, namely: It is a refusal to work for A, with whom the strikers have no dispute because A works for B, with whom the strikers have a dispute, for the purpose of forcing A to force B to yield to the strikers' demands. In the case at bar the strike on the L. P. Soule & Son Company was a strike on that contractor to force it to force the owner of the Ford building to give work of pointing to the defendant unions. That passes beyond a case of competition where the owner of the Ford building is left to choose between the two competitors. Such a strike is in effect compelling the L. P. Soule & Son Company to join in a boycott on the owner of the Ford building. It is a combination by the union to obtain a decision in their favor by forcing third persons who have no interest in the dispute to force the employer to decide the dispute in their (the defendant unions') favor. Such a strike

is not a justifiable interference with the right of the plaintiffs to pursue their calling as they think best. In our opinion, organized <sup>588</sup> labor's right of coercion and compulsion is limited to strikes against persons with whom the organization has a trade dispute; or, to put it in another way, we are of opinion that a strike against A, with whom the strikers have no trade dispute, to compel A to force B to yield to the strikers' demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best. Only two cases to the contrary have come to our attention, namely: Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119, 21 L. R. A. 337, and Jeans Clothing Co. v. Watson, 168 Mo. 133, 90 Am. St. Rep. 440, 67 S. W. 391, 56 L. R. A. 951. The first of these two cases was overruled on this point in Gray v. Building Trades Council, 91 Minn. 171, 103 Am. St. Rep. 477, 97 N. W. 663, 63 L. R. A. 753. The conclusion to which we have come is supported by My Maryland Lodge v. Adt, 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752; Gray v. Building Trades Council, 91 Minn. 171, 103 Am. St. Rep. 477, 97 N. W. 663, 63 L. R. A. 753; Purington v. Hinchliff, 219 Ill. 159, 109 Am. St. Rep. 322, 76 N. E. 47, 2 L. R. A., N. S., 824; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13, 42 L. R. A. 1407; Crump v. Commonwealth, 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620; State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; Purvis v. United Brotherhood of Carpenters, 214 Pa. 348, 112 Am. St. Rep. 757, 63 Atl. 185; Gatzow v. Buening, 106 Wis. 1, 80 Am. St. Rep. 1, 81 N. W. 1003, 49 L. R. A. 475; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Temperton v. Russell, [1893] 1 Q. B. 715; Taft, J., in Toledo etc. Ry. v. Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387; Loewe v. California State Federation of Labor, 139 Fed. 71; Hopkins v. Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99; Casey v. Cincinnati Typographical Union No. 3, 45 Fed. 135, 12 L. R. A. 193.

It is settled in this commonwealth by a long line of cases that a defendant is liable for an intentional and unjustifiable interference with the pursuit on the part of the plaintiff of his calling, whether it be of labor or business: Walker v. Cronin, 107 Mass. 555; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Vegelahn v. Guntner, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L. R. A. 722; Plant v. Woods,

176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. 339; *Martell v. White*, 185 Mass. 255, 102 Am. St. Rep. 369 N. E. 1085, 64 L. R. A. 260.

For the reason that the strike on the buildings erected by the L. P. Soule & Son Company was not a strike in a trade dispute between the union and that corporation the first and second clauses of the decree were in substance correct. Robert H. Pickett, however, is the only plaintiff who is shown to have had any interest in the work on the Ford building, and therefore the second clause of the decree alone should stand.\*

<sup>589</sup> A few matters of detail remain to be dealt with.

All that the Bricklayers' Union No. 27 seems to have done was to adopt working rules making pointing a part of the trade of bricklaying. There is no evidence that it authorized the sending of the circular letter or took part in the strike. That union and the members of it should be stricken from the decree.

No objection has been taken to the decree in favor of Robert H. Pickett on the ground that damages would have given him adequate compensation for breach of his contract. For that reason it is not necessary to consider whether his proper remedy was an action at law for damages, as in *Carew v. Rutherford*, 106 Mass. 1, *Walker v. Cronin*, 107 Mass. 1, *Berry v. Donovan*, 188 Mass. 353, 108 Am. St. Rep. 499 N. E. 603, and *Quinn v. Leatham*, [1901] App. Cas. 495.

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\* The material part of the decree was as follows: "That the respondents in said bill, to wit, the Bricklayers' Benevolent Protective Union No. 3 and No. 27, the Stone Masons' Benevolent and Protective Union No. 9, and each and every member thereof, to wit, Jeremiah J. Driscoll, Patrick J. Walsh, Michael J. Shea, J. Crockett Dennis J. Sullivan, George K. Watson, John P. Burke, J. M. R. Theodore Eldracher, Joseph W. Luke and George J. Twiss, and each of them, their servants, agents, confederates and attorneys, be and they are hereby perpetually restrained and enjoined from combining and conspiring in any way to compel L. P. Soule & Son Company or any other person, firm or corporation, by force, threats, intimidation or coercion, to discharge the complainants in the bill of complaint to wit, Robert H. Pickett, Charles A. Pickett, Thomas J. Lally, Walter H. Wilkins, or to refrain from further employing them and about their trade and occupation, and from combining and conspiring to compel the owners of the so-called Ford building on a certain place in the city of Boston to break or decline to carry out their said contract with the complainant Robert H. Pickett, and from combining and conspiring to interfere with, the said complainant or any of them, in the practice of their trade and occupation, or to prevent them from obtaining further employment thereat."

There is a point of practice which must be noticed. As we have said, the plaintiffs have undertaken to make three unincorporated labor unions parties defendant. That is an impossibility. There is no such entity known to the law as an unincorporated association, and consequently it cannot be made a party defendant. That was conceded in *Taff Vale Ry. v. Amalgamated Society of Railway Servants*, [1901] App. Cas. 426. The point decided in that case was that the labor union defendant in that case could be sued because it was registered under trades union acts of 1871, chapter 31, and 1876, chapter 22. At law, if the objection is <sup>590</sup> properly taken, every member of an unincorporated association must be joined as a party defendant. In equity, if the members are numerous, a number of members may be made parties defendant as representatives of the class. The practice in Massachusetts in suits against members of unincorporated labor unions generally has been in accordance with these well-settled principles: See *Bowen v. Matheson*, 14 Allen, 499; *Carew v. Rutherford*, 106 Mass. 1; *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 57 L. R. A. 339; *Martell v. White*, 185 Mass. 255, 102 Am. St. Rep. 341, 69 N. E. 1085, 64 L. R. A. 260. A trade union was made a party defendant in *Vegelahn v. Guntner*, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L. R. A. 722, and the anomaly seems to have escaped attention. The judge who entered the decree in the case at bar made it apply to the unions "and each and every member thereof." He seems to have treated the case as a case where a numerous body had been properly represented by defendants joined for that purpose. Possibly, so far as the trial of the case was concerned, the members of these two unions were in fact represented by the individual defendants. But there is nothing on the record which justifies a decree against "each and every member" of the three unions on the ground that the defendants were joined as representing the individual members of the unions constituting a numerous class of defendants. The three unions should be stricken from the bill as parties defendant, and proper allegations should be made to bind the members of the two unions as parties defendant. If the individual defendants were proper representatives of the members of the unions in question, and these members would suffer

no damage from the bill being so amended now, that be done. The cases are collected in *Fay v. Walsh*, Mass. 374, 77 N. E. 44.

Upon the bill being so amended within sixty days, decree may be modified as hereinbefore set forth, and being so modified, affirmed; otherwise the decree must be reversed.

So ordered.

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*Strikes and Strikers* are discussed in the note to *O'Neill v. Beha*, 61 Am. St. Rep. 706, and boycotting is the subject of a note to *v. Building Trades Council*, 103 Am. St. Rep. 488. For subsequent authorities on these questions, see *Purvis v. United Brotherhood of Carpenters*, 214 Pa. 348, 112 Am. St. Rep. 757; *Franklin Union v. People*, 220 Ill. 355, 110 Am. St. Rep. 248; *Purington v. Hine*, 219 Ill. 159, 109 Am. St. Rep. 322.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MICHIGAN.**

**SCHREMMS v. PERE MARQUETTE RAILROAD COMPANY.**

[145 Mich. 190, 108 N. W. 698.]

**RAILROADS—Injury at Crossings—Presumption of Care.**—If a person on the highway is killed on a railroad crossing at night without any eye-witnesses to the accident, by a locomotive running backward at a rate of thirty miles per hour without displaying any light that would throw light ahead, and without giving the statutory signals, there is no presumption that the person killed failed to stop, look and listen, or that he was guilty of contributory negligence. (pp. 293, 296.)

F. W. Stevens and J. C. Weadock, for the appellant.

E. Wilber and F. L. Eaton, for the appellee.

<sup>190</sup> **MOORE, J.** The plaintiff recovered a judgment in the court below. The defendant brings the case here by writ of error.

The claim of defendant, as stated by its counsel in their brief, is:

“There is no testimony in this case as to the conduct of the plaintiff’s intestate as he approached the crossing, and in so far as establishing freedom from contributory negligence is concerned, the plaintiff rested his case entirely on the presumption that his intestate did stop, look and listen before going upon the track of the defendant. The trial <sup>191</sup> court left it to the jury to say whether or not this presumption had been overcome by the evidence. This was error. The undisputed testimony shows that if plaintiff’s intestate stopped, looked and listened, he must have seen or heard the approaching engine, and raises the conclusive

presumption that he did not stop, look and listen, or that if he did, he did not heed what he saw or heard.

"One who is struck by a moving train which could not be seen or heard from the point he occupied when it became his duty to stop, look and listen, must be conclusively presumed to have disregarded that duty, or having performed it, to have gone negligently into obvious danger." Citing *Kwiatkowski v. Grand Trunk Ry. Co.*, 70 Mich. 538 N. W. 463, and many other cases.

"Had he stopped and listened for the train as it was his duty to do, he would have heard it, and avoided the danger. The presumption, therefore, is that he either did not perform his duty in these regards, or that he ventured blindly into an obvious peril. The judge should have directed a verdict for the defendant, on the ground that plaintiff had failed to show that his intestate was free from contributory negligence."

There is not very much dispute about the law, but difficulty comes in applying it to a given case; therefore it is important to recall the case made by the testimony of the plaintiff.

Plaintiff's intestate was instantly killed by the tender attached to one of defendant's locomotives, as he was driving across a highway crossing, a short distance north of Saginaw on the evening of November 14, 1904. There was no eyewitness of the accident. The highway at that point ran north and south, and the railroad track, which is elevated somewhat above the level of the surrounding country, ran northeast and southwest. Plaintiff's intestate approached the crossing from the south, and the locomotive with which he collided approached from the southwest. In the daytime the traveler approaching the crossing from the south could for nearly all of the time see a locomotive approaching from the southwest for a half mile before he reached the crossing. The objects that would tend to obstruct his vision at any time were some <sup>192</sup> small buildings, the telegraph poles and some trees. Plaintiff's intestate was familiar with the crossing, having traveled over it almost daily for many years. He had a gentle team and was a good driver. The tender which struck him was moving backward from Saginaw toward Bay City at the time of the accident. There was a red light hanging on the tender, which was in front



as the locomotive with the tender attached was running backward. There were also two small white classification lights on the sides of the smokestack. The headlight was in its usual place on the head end of the engine.

Plaintiff introduced evidence tending to show that defendant's engine approached the crossing running at a rate of twenty-five or thirty miles an hour, and that the locomotive whistle was not sounded before the engine reached the crossing, and that the bell was not ringing. It was the claim of defendant that the crossing signals were given. The highway near the crossing had been recently graveled, and a wagon in motion over it would make considerable noise. It was very dark at the time of the accident, and there was some wind from the northeast. The locomotive left Saginaw some time after 5:45 P. M., ahead of a passenger train which was to leave a little later. The fireman testified, among other things: "As we approached the crossing, I looked ahead. I was on the side from which Mr. Schremms approached the crossing. It was dark that night, and I did not see Mr. Schremms, nor did I see the wagon or team. When we got to the crossing I heard a noise and the dirt flew up by the windows and I hollered over to the engineer that I thought we had torn up the crossing."

The engine was then stopped, and the fireman went back to warn the expected passenger train. Neither the fireman nor engineer knew they had struck a team and wagon until after the engine was stopped.

On the cross-examination the fireman testified:

"I did not see Mr. Schremms or his team. I thought we had struck the crossing and torn it up as we went <sup>123</sup> across. I had no idea that we had struck a double team.

"Q. How far were you from this red light hung on the rear of the tender? A. About thirteen or fourteen feet.

"Q. That light would shine out on the track, wouldn't it, what light there was? A. Well, it wouldn't show the rails or anything like that.

"Q. Well, I mean the light that would be thrown forward would be thrown toward this team, wouldn't it? A. Yes, sir.

"Q. Tell me why when you were looking right there at that crossing you couldn't see that team? A. There

wouldn't be enough reflection to see a team, with a lamp.

"Q. You couldn't see a double team by that light thirty feet away, that is true, is it? A. Yes, sir.

"Q. It couldn't have been a very brilliant light, could it? A. Well, I don't think you could see anything with a red lamp anyway. . . . The classification lights were white lights on each side of the smokestack. They would not throw any light in the rear of the tender. They did help to discover the team on the track. The classification lights are placed so that they show only a little light on each side—about three inches in diameter. They are not intended to throw any light to the rear. It is usual when we are running an engine and tender to have a red light in the rear. If we had cars we would have had three or four red lights on the back end of the caboose. We never run trains in the night-time without having red lights in the rear. If we had a headlight placed on the rear of the tender it would have shown a bigger light, and would light up the track quite a distance ahead of us. We had never been in the habit of running this engine over the track at this hour of the day before. I don't know whether the engine had ever been down there before that time or not.

On the redirect examination he testified: "The engine we had was a large engine called a consolidated engine. I have had occasion to see red lamps frequently. They are not used for the purpose of throwing light to see by, but for the purpose of being seen. On a train we would always have more than one red light at the <sup>194</sup> rear. The regulation is three red lights and sometimes they have four; one on each side of the caboose and the deck light in the cupola of the caboose."

The testimony of the engineer did not differ materially from that of the fireman.

Counsel in their brief say it is a matter of common knowledge that a red light is always a warning of danger. It might also be added that it is a matter of common knowledge that red lights are displayed at the rear of trains. This is also shown by the testimony of the fireman and the engineer. In the direction from which the train was approaching the deceased, there was a red switch light leading to a siding which ended before it reached the highway.

At this point the railroad track made a decided curve, so that when the deceased was forty to sixty feet away from the track, the locomotive and tender, instead of coming toward him at an angle, were coming directly toward him, making it difficult to tell whether the train was coming or going. The situation, then, was that Mr. Schremms was approaching a highway crossing with which he was perfectly familiar, when it was very dark, at a time when a passenger train might be expected soon to go north. For nearly all the time he could have seen a well-lighted passenger train, or a freight train equipped with a headlight for a long distance. He knew that. If he looked he did not see a passenger train nor did he see an approaching train with a headlight. If he saw any light at all it was a red light, which so far as it conveyed any information at all in relation to the proximity of a train, would indicate that he was looking at the rear of a train instead of an approaching one; or that what he saw was the switch light leading to the siding before mentioned, of which he had knowledge. But it is said had he stopped and listened he would have heard, and the testimony of Mrs. Lawrence is cited to sustain that claim. Her house is about eight rods south of the crossing. She was listening for the train upon which she expected her husband to come.

195 "I was waiting to hear the whistle, when I heard a train rushing by at a terrible speed. I thought to myself 'Is that the train? I didn't hear it whistle.' I rushed to the kitchen window and pushed up the curtain as the engine went by. . . .

"Q. Now, you heard the bell ringing? A. I heard the bell after I put the curtain up once or twice. . . . I could see or tell by the noise that it was an engine. I saw just a faint light as it passed. It had just passed the house when I saw it. I just had an instant to look at it, but in that instant I saw this light. As I looked at it I thought it had just crossed the highway. It had crossed over the culvert."

This clearly indicates that this witness heard no whistle. That when she first heard the noise of the train, it was rushing past the house; that she at once pushed up the curtain, and that it was not until after this she heard the bell, and simultaneous with this the tender and engine crossed the highway. Giving this testimony its fullest effect

there is nothing in it indicating the engine could be heard or that the bell was rung in time to be of any use whatever to the deceased.

There were other witnesses in a position to hear, who heard neither bell nor whistle. The testimony we have already quoted shows it was so dark the engineer and fireman did not know they had struck this team until after the engine was stopped. How, then, could they know when to whistle for the crossing? Certainly not from seeing its approach to it, though it is quite possible the switch light might have aided them. But even if the deceased had heard the noise and knew it to be an engine, upon seeing the red light, which indicated the rear of it was toward him, he might naturally suppose it had been putting cars on sidings, and was on its way back to the city.

The precaution Mr. Schremms was bound by the law to take was the care that an ordinarily prudent man would have exercised under like circumstances. It cannot be said from the evidence in this case that he did not do so. It is not here to give his version of the transaction. In the absence of testimony to show otherwise, the presumption is he was in the exercise of due care: See *Mynning v. Detroit L. & N. R. R. Co.*, 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147.

In *Staal v. Grand Rapids & I. R. R. Co.*, 57 Mich. 239, N. W. 795, Justice Campbell, speaking for the court, said: "In the absence of any knowledge of what was passing in his mind, we cannot hold him conclusively at fault unless there is no sensible explanation to the contrary reasonably possible. But he had a right to suppose that defendant would not violate any legal duty, and he could not be bound to suppose it would fail to take reasonable measures to prevent mischief."

It cannot be said in this case that, because Mr. Schremms was killed, the presumption that he looked and listened was overcome. If the train had been running with a headlight where it belonged, where the traveler on the highway could have seen it, and he was then killed, a very different question would be presented. As bearing upon the degree of care required, see, also, *Guggenheim v. Lake Shore & M. R. R. Co.*, 66 Mich. 150, 33 N. W. 161. It was not error for the judge to refuse to direct a verdict for defendant. T

testimony of the engineer and fireman as to the manner of running this train upon a dark night, without proper equipment to indicate its proximity to one traveling upon the highway, indicates such a reckless disregard of the rights of the traveler upon the highway as to merit the severest censure.

Judgment is affirmed.

McAlvay, Grant, Blair, and Montgomery, JJ., concurred.

*As to When the Exercise of Care may be Presumed, see the note to Chicago etc. Ry. Co. v. Wilson, ante, p. 102.*

## SAGINAW LUMBER AND SALT COMPANY v. GRIFFORE.

[145 Mich. 287, 108 N. W. 681.]

**INJUNCTION to Protect Fishing Rights.**—A complaint for an injunction alleging that the complainant is the owner in fee of a certain island, and has been in the actual possession thereof and the fishing rights pertaining thereto for upward of twenty years, and that the fishing rights are worth a large sum annually, that the defendant had theretofore leased such fishing rights, that his lease had expired, that he threatens to continue fishing and trespassing upon the premises for the coming year which would result in irreparable loss to the complainant, and that the defendant is irresponsible financially, states a good prima facie case for an injunction. (p. 298.)

**INJUNCTION—Failure to Appeal—Disregarding Injunction—Certiorari.**—If, after a full hearing, the court, in the exercise of its discretion, refuses to dissolve an injunction granted temporarily, and no appeal is taken, but the defendant proceeds to ignore it, he is not entitled to a writ of certiorari to set aside his conviction for such contempt on the ground that the injunction is void. (p. 299.)

Weadock, Purcell & Weadock, for the complainant.

F. L. Eaton and A. E. Snow, for the defendant.

<sup>287</sup> MOORE, J. The complainant in October, 1905, filed an injunction bill and obtained a temporary injunction. <sup>288</sup> The defendant answered the bill, and moved to have the injunction dissolved. After a hearing the motion to dissolve the injunction was overruled. No appeal was taken from this order. After this motion was decided an amended answer was filed. The defendant ignored the injunction.

He was cited before the court to show cause why he should not be punished for contempt. To this citation he made no answer. After a hearing he was found guilty of contempt by the judge, who directed that he pay a fine of twenty-five dollars or in default thereof that he be confined to county jail, etc. A precept was issued and placed in the hands of the sheriff for his arrest, because he had not paid the fine as provided in the order. He then paid the fine to the sheriff and now seeks by the writ of certiorari to review the action of the circuit judge in adjudging him guilty of contempt.

It is claimed the injunction was void because it deprived the defendant of the right to carry on his occupation without a hearing, and as the injunction was void, defendant was not guilty of contempt in disregarding it. In the complaint it was alleged that complainant was, by means of conveyances to its grantors and from them to it, the owner in fee of Crow Island, and had been in the actual possession thereof and the fishing rights pertaining thereto, for a period of twenty years, and that the fishing rights are worth one thousand dollars annually. Paragraph 6 of the original answer reads: "For the past twenty years your orator has been for the most of the time operating a sawmill and lumber and salt plant on the main land above described as six hundred and forty acres, which includes said Crow Island, and during all of said time your orator has been in absolute and undisputed actual possession of said island and the lands thereof, and all riparian and fishing rights, belonging thereto, and exercised said possession and control over the same by using said island in connection with said lumber business, and to boom logs and conducting, renting and controlling the fishing rights pertaining thereto."

Paragraph 8 of the original answer says: <sup>239</sup> "Admitting the sixth paragraph, defendant admits the same."

The bill alleges in detail the method of leasing the fishing rights, the making of a lease to defendant for the fishing season ending in the spring of 1905. It then alleges subsequent trespasses by defendant both on the island and on the fishing grounds, and defendant's intention to continue these trespasses, resulting in irreparable loss to complainant unless restrained, and that the defendant was wholly responsible financially.

Defendant in his answer insisted he had the right to fish as he proposed to do, and had exercised that right for a series of years. We do not think it can be said the injunction was void. The bill of complaint and the affidavit accompanying it made a prima facie case. After a full hearing, the circuit judge in the exercise of his discretion refused to dissolve the injunction. No appeal was taken from that order, but defendant proceeded to ignore it. We do not think him entitled to the writ he asks: See *Campbell v. Kent Circuit Judge*, 111 Mich. 575, 70 N. W. 141; *Swett v. Thorkildsen*, 115 Mich. 314, 73 N. W. 370; *Davis v. Township of Frankenlust*, 118 Mich. 494, 76 N. W. 1045; *F. H. Wolf Brick Co. v. Lonyo*, 132 Mich. 162, 102 Am. St. Rep. 412, 93 N. W. 251; *Rhoades v. McNamara*, 135 Mich. 644, 98 N. W. 392.

The order of the circuit court is affirmed.

Carpenter, C. J., and Montgomery and Hooker, JJ., concurred.

OSTRANDER, J. I concur in affirming the case upon the ground that the order appealed from has been satisfied and discharged.

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*Injunction Against Trespassers* on real property are considered in the note to *Moore v. Halliday*, 99 Am. St. Rep. 731-753. At page 751 of this note injunctions to protect fishing and hunting rights are discussed.

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### OLMSTEAD v. TRACY.

[145 Mich. 299, 108 N. W. 649.]

**DEEDS—Quitclaim—Effect.**—A quitclaim deed is not an assertion of any particular, or of any, title, and does not of itself operate as an estoppel against either the grantor or grantee as to the nature or extent of the title: (p. 301.)

**COTENANCY—Tax Title—Quitclaim Deeds.**—If cotenants, one of whom is a minor, execute a quitclaim deed to certain land, against which at the time there are several outstanding tax titles which the grantee afterward acquires, and then conveys the land by warranty deed, the last grantee is not estopped to deny as against such minor cotenant, upon his becoming of age, his contention that his deed executed during his minority was ineffective as the relation of cotenants existed between him and his grantee, whose purchase of the outstanding titles inured to his benefit. Such outstanding titles hav-

ing originated through no default of such grantees, at a time when no relation existed between them and such cotenant requiring either as to the other, to pay the taxes, the quitclaim deed did not create any such relation. (p. 302.)

C. McPherson, for the appellant.

Quinn & Wixson and F. Wheat, for the appellees.

<sup>300</sup> HOOKER, J. The trial court directed a verdict for the defendants, and plaintiff has appealed. The action is for ejectment. Plaintiff's claim of title rests on a federal patent to his father and uncle, Hiram and George Olmstead, respectively, and inheritance from the former, who at the time the action was begun was survived by a widow, Martha, and two children, i. e., the plaintiff and his sister. The proof conclusively shows that the land was sold repeatedly for taxes, and deeded by the auditor general, and that the titles were outstanding in various persons at the time Judson and Wiley, the defendants' grantors, first had their attention directed to the lands. Judson and Wiley purchased most of these tax titles, taking quitclaim deeds from the respective owners, and the defendants' subsequent purchase would be a complete answer to plaintiff's action for the fact that, before purchasing any of said tax titles, Judson and Wiley took quitclaim deeds from George, Martha, and Katherine Olmstead and the plaintiff. It is shown that the plaintiff was but twelve years old when he executed his deed, and he claims that it did not divest him of title, and that the acceptance by Judson and Wiley of deeds from George, Martha, and Katherine Olmstead made Judson and Wiley tenants in common with the plaintiff, and that therefore the purchase of tax titles by Judson and Wiley inured to plaintiff's benefit under the alleged rule that a tenant in common cannot obtain title against a cotenant by purchasing tax titles.

There was no tenancy in common, because the Olmsteads had no interest in the lands at the time they gave their quitclaim deeds to Judson and Wiley, which therefore conveyed nothing, and the acceptance of the quitclaim deeds could not make the parties thereto tenants in common, when neither party had or acquired thereby any interest in the lands. Again, the case is within the rule laid down in the case of *Sands v. Davis*, 40 Mich. 14. If, as counsel claim,



the quitclaim deed from the Olmsteads was void as to the plaintiff, Judson and Wiley <sup>301</sup> acquired only the interests of his mother and sister, and were under no obligation to protect his interest in common with their own against outstanding titles, which they were at liberty to purchase for their own benefit: See, also, *Blackwood v. Van Vleit*, 30 Mich. 118; *Cook v. Clinton*, 64 Mich. 313; *Watkins v. Green*, 101 Mich. 497; *Fuller v. Swensberg*, 106 Mich. 317; *Defreese v. Lake*, 109 Mich. 428, 32 L. R. A. 744; *Boynton v. Veldman*, 131 Mich. 559; *Brigham v. Reau*, 139 Mich. 256. It is unnecessary to discuss other questions.

The judgment is affirmed.

Moore, J., concurred with Hooker, J.

OSTRANDER, J. I concur in affirming the judgment. At the time the opinion in *Dubois v. Campan*, 24 Mich. 360, was handed down, it was not supposed that this court had before then determined that a tenant in common out of possession could not purchase from a stranger in good faith, and set up against his cotenants, an outstanding tax title, even if the tax sale was based in part upon his own default, since the point is in that case expressly left undecided. In the case at bar all of the tax titles had accrued and were outstanding at the time when the alleged cotenancy began. The cases of *Butler v. Porter*, 13 Mich. 292, *Sleight v. Roe*, 125 Mich. 585, 85 N. W. 10, and *McPheeters v. Wright*, 124 Ind. 560, 24 N. E. 734, 9 L. R. A. 176, cited and relied upon by counsel for appellant, are each of them cases where the tax sales were made during the period of the cotenancy, for which reason they are not controlling here. The deed in which, in 1883, plaintiff joined, which he now revokes, was a quitclaim deed, not an assertion of any particular, or of any, title. It did not of itself operate as an estoppel against either the grantor or grantee as to the nature or extent of the title: *Sparrow v. Kingman*, 1 N. Y. 242, approved in *Sands v. Davis*, 40 Mich. 14, 20. Plaintiff's grantee, after acquiring outstanding titles to some or all of the lands for each of the years from 1864 to 1881, excepting for the year 1866, conveyed the land <sup>302</sup> by warranty deed in 1895, and as to a portion of the lands two other warranty deeds and actual possession thereunder intervene the deed from plaintiff and the beginning of this suit. The outstanding and ap-

parently superior titles having originated through no fault of plaintiff's grantee or of defendants, and no relation having existed, when plaintiff's deed was made, between himself and his grantee, which required either, as to the one or the other, to pay the taxes, the quitclaim deed not having created any such relation, and plaintiff's grantee having, after purchase of the outstanding and superior titles, conveyed with covenants of warranty, defendants are not forbidden to assert that the purchase of the tax titles did not inure to the benefit of plaintiff and of the title which he now asserts.

Carpenter, C. J., and Montgomery, J., concurred with Ostrander, J.

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*The Right of a Cotenant to Acquire and Enforce Tax Titles*—subject of a note to Hoyt v. Lightbody, post, p. 358.

*Quitclaim Deeds* are discussed in the note to Babcock v. Wells, Am St. Rep. 854-863. No estoppel arises either from making or accepting a quitclaim deed: See page 863 of this note.

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### KOCH v. SUMNER.

[145 Mich. 358, 108 N. W. 725.]

**MECHANICS' LIENS—Counterclaim.**—On a bill to foreclose a mechanic's lien brought on the chancery side of the court, the defendant may maintain a cross-bill or counterclaim to recover damages sustained by the claimant's failure to perform according to the contract, although an answer in the nature of a cross-bill or counterclaim is not provided for by the lien law. (p. 303.)

A. Brown and E. R. Sunderland, for the complainants.

A. J. Sawyer & Son, for the defendant.

**358 MOORE, J.** Complainants seek by bill to foreclose a mechanic's lien for the making of improvements and repairs upon the defendant's dwelling-house. The bill prays: First, for an accounting; second, a lien upon the property for the amount found due; third, a decree against defendant May B. Sumner, and sale of the property upon default of payment; fourth, in case of sale, that all persons claiming through or under the defendant after the commencement

suit shall be forever barred; fifth, for other and further relief.

<sup>359</sup> The defendant answered charging failure to perform the contract and damages accruing by reason thereof, and alleges the payments of one hundred and ninety-one dollars and seventy cents and fifty dollars more than complainants credited her; denies most of the claim for extras; denies that anything is due to the complainants, and, by cross-bill, charges that she was presented with a plan showing additions, alterations and improvements which she desired made, with specifications and drawings, which formed a part of the contract, and also a written contract which she signed; charges a failure of complainants to complete the contract, by reason of which she suffered damages, stating them at length, and prayed for relief as follows: (a) That the complainants shall come to a just and fair accounting with this defendant for each and every failure to conform with the provisions of their said contract, plans, drawings and specifications, and that the just amount due to this defendant from the said complainants by reason of such failure shall be ascertained and a decree rendered in her favor against said defendants therefor; (b) that the bill of complaint in this case shall be dismissed with costs to this defendant. Then followed a prayer for general relief.

The complainants demurred to the cross-bill, for the reason that the answer in the nature of a cross-bill is not authorized by the lien law, in that the defendant seeks thereby to recover a decree against the complainants for damages, which she alleges she has sustained in excess of the complainants' demand. The court overruled the demurrer, and the case is brought here by appeal.

Counsel say: "The rights of parties in actions to enforce mechanics' liens are created by statute, and no proceedings unauthorized by the statute can be had in actions brought thereunder. As this court has said in *Sterner v. Haas*, 108 Mich. 488, 66 N. W. 348: 'The lien law is in derogation of the common law, and all rights under it are statutory, and cannot be extended beyond the provisions of the statute.'

<sup>360</sup> "Hence, to determine the propriety of the cross-bill filed herein, it is necessary to look at the statute. The only provision in the lien law, authorizing the court to render a personal decree of any kind, is section 14, which is section

10723 of Miller's Compiled Laws, and it reads as follows: 'Upon final decree the court may order a sale of the buildings or machinery separate, or the lands, buildings, machinery, structure or improvements, together, by a circuit commissioner or receiver, or may order the property in the hands of a receiver to be leased or rented from time to time under the direction of the court until the liens shall be discharged, or make such other order or disposition of the premises as justice may require. If upon the coming of the final report and confirmation of the final report any portion of the lien shall still be unpaid, the court may enter personal decree for the same against the party who may be personally liable therefor, and execution shall issue for the same as upon other personal decrees rendered by the court.'

"The statute authorizes no personal decree whatever except a decree for a deficiency in favor of the contractor, subcontractor or materialman, and authorizes this only after the property has been exhausted. The proceeding under the lien law is primarily a proceeding in rem, to charge certain specific property with the debt. The debt being proved by the lien claimant, the court must proceed against the property by ordering a sale or other suitable disposition thereof; and it is only after such resort to the property, and after exhausting the remedy as a proceeding in rem, that a decree in personam can be made. Unless the complainant can show a valid claim against the property in rem, such, he has no standing in court."

It is then argued that, as the statute does not authorize a decree in favor of defendants, the cross-bill cannot be entertained, citing cases.

The question involved has never been directly before this court. A case quite in point is *Springfield Milling Co. v. Barnard & Leas Mfg. Co.*, 81 Fed. 261, 26 C. C. A. 389. We quote from the opinion as follows:

"The office of a cross-bill is either to warrant the grant of affirmative relief to the defendant in the original suit, to obtain a discovery in aid of the defense in that suit, to enable the defendant to interpose a more complete defense<sup>361</sup> than that which he could present by answer, or to obtain full relief to all parties, and a complete determination of all controversies which arise out of the matters charged in the original bill. The fact that the cross-bill fair

tends to accomplish either of these purposes is generally a sufficient ground for its interposition. It must seek equitable relief; but, subject to this qualification, a complainant who has brought a defendant into a court of equity in order to subject him to an adjudication of his rights in a certain subject matter cannot be heard to say that there is no equity in a cross-bill which seeks an adjudication of all the rights of the parties to the original suit in the same subject matter. The issues raised by the cross-bill must be so closely connected with the cause of action in the original suit that the cross-suit is a mere auxiliary or dependency upon the original suit, but subject to this qualification, new facts and new issues may properly be presented by a cross-bill: Story on Equity Pleadings, secs. 398, 399; 1 Beach on Modern Equity Practice, secs. 433, 435; Carnochan v. Christie, 11 Wheat. (U. S.) 446, 6 L. ed. 516; Cross v. De Valle, 1 Wall. (U. S.) 1, 17 L. ed. 515; Ayres v. Carver, 17 How. (U. S.) 591; Meissner v. Buek, 28 Fed. 161, 163; Chicago etc. R. Co. v. Third Nat. Bank, 134 U. S. 276, 10 Sup. Ct. Rep. 550, 33 L. ed. 900; Davis v. American & Foreign Christian Union, 100 Ill. 313; Cartwright v. Clark, 4 Met. (Mass.) 104; Derby v. Gage, 38 Ill. 27; French v. Griffin, 18 N. J. Eq. 279; Graham v. Berryman, 19 N. J. Eq. 29; Wickliffe v. Clay, 1 Dana (Ky.), 585; Allen's Exr. v. Roll, 25 N. J. Eq. 163; King v. Enterprise Ins. Co., 45 Ind. 43. Thus, in a suit to cancel deeds made to secure a debt, the defendant may maintain a cross-bill to reform the deeds, and to foreclose the mortgage which they evidence: Carnochan v. Christie, 11 Wheat. (U. S.) 446, 6 L. ed. 516. If an original bill is filed for specific performance of a contract, the defendant may properly exhibit a cross-bill for the surrender and cancellation of the agreement: Cross v. De Valle, 1 Wall. (U. S.) 1, 17 L. ed. 515; Meissner v. Buek, 28 Fed. 161. Where a suit in equity is instituted to vacate or set aside a lien upon property by judgment, mortgage, or otherwise, the defendant may maintain a cross-bill to establish and foreclose the lien: Railroad Cos. v. Chamberlain, 6 Wall. (U. S.) 748, 18 L. ed. 589; Chicago etc. R. Co. v. Third Nat. Bank, 134 U. S. 276, 10 Sup. Ct. Rep. 550, 33 L. ed. 900. The converse of this proposition is equally true. When an original suit is brought to establish and foreclose a lien upon the property of the defendant <sup>262</sup> he may properly exhibit a cross-bill in

that suit for the avoidance of the lien, and the cancellation and discharge of the record of it, which clouds his title. *Graham v. Berryman*, 19 N. J. Eq. 29; *Wickliffe v. Clark*, 1 Dana (Ky.), 585. This is the case which this record presents. The appellee filed in the proper public office a claim of lien upon the property of the appellant for more than ten thousand dollars on account of materials it had furnished and services it had rendered in remodeling the appellant's mill, pursuant to a contract between the parties. It brought this suit to establish and foreclose that lien. The appellant exhibited its cross-bill in that suit for the cancellation of that lien and its discharge of record. The averment of the existence of the mechanic's lien and the prayer for its foreclosure constitute the only grounds for equitable relief presented by the original bill. The averments of the cross-bill that the debt claimed in the original bill was not due; that the lien did not exist; that the appellant was a nonresident of the state of Missouri, and without jurisdiction of the court; that it had so failed to fulfill its guaranties of its contract that the mill it remodeled was worth ten thousand dollars less than it would have been if the contract had been complied with; that the appellant had wasted wheat of the appellant worth two thousand dollars in useless experiments with its plansifters, and that it had racked and weakened the walls of the mill—together with its prayer that the pretended lien might be canceled and discharged of record, certainly presented equities stronger than those exhibited by the original bill, and brought the cross-bill within the established precincts of equity jurisdiction. The owner of property may always maintain a suit in equity to clear the record of its title of invalid liens that apparently cover it, and there is no stronger reason for permitting him to do so by a cross-bill when the holder of the pretended lien has sued him to foreclose it. It is idle to argue that this appellant had an adequate remedy at law for the wrongs it pleads in the original bill. It could obtain no decree of cancellation of the lien upon its property at law. It could not even maintain an action at law until it followed the appellee beyond the jurisdiction of the court of its residence into the state of Illinois. Does equity require a defendant who has a defense, counterclaim or setoff, to pay a debt secured by a lien upon its property?

erty to sit quietly by and see the lien foreclosed and his property sold because he can enforce his claim against the complainant <sup>363</sup> in an action at law in another jurisdiction? The remedy at law which precludes relief in equity must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity': *Boyce v. Grundy*, 3 Pet. (U. S.) 210, 7 L. ed. 655; *Oelrichs v. Spain*, 15 Wall. (U. S.) 211, 21 L. ed. 43; *Preteca v. Maxwell Land Grant Co.*, 50 Fed. 674, 1 C. C. A. 607; *Foltz v. St. Louis etc. R. Co.*, 60 Fed. 316, 8 C. C. A. 635; *Hayden v. Thompson*, 71 Fed. 316, 17 C. C. A. 592. Would an action at law against the appellee in the state of Illinois, in addition to the suit in equity brought by the appellee in the state of Missouri, be as practical and efficient for the prompt administration of justice between these parties as the presentation and adjudication of all the controversies between them growing out of the contract in the single suit which the appellee brought in Missouri? These questions are susceptible of but one answer.

"It is urged that the only claims presented by the cross-bill that were not pleaded in the answer of the appellant to the original bill were those for the waste of the wheat, and the injury to the walls of the mill; that these could not be considered in equity, and hence the cross-bill was properly dismissed. The answer is: 1. The cross-bill repleaded the defenses in the answer and prayed for affirmative relief—the cancellation of the record of the lien. Those defenses, if sustained, warranted that relief, regardless of the claims for damages for the waste of the wheat and for injury to the walls of the mill, and a cross-bill which warrants affirmative relief upon the same facts pleaded as a defense in the answer to the original bill is well founded. 2. The statutes of the state of Missouri provide that in any civil action, whether at law or in equity, a defendant may plead and prove as a counterclaim any cause of action, whether legal or equitable, which arises out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim: *Missouri Rev. Stats. 1889, sec. 2050*. Under this provision of the statutes, a counterclaim for damages for injuries to property in the performance of services may be maintained in an action for their price or value: *Emery v. St. Louis K. etc. R. Co.*, 77 Mo. 339.

If the appellee had brought this suit in one of the states of Missouri, the appellant's claim for wasted wheat and damage to the walls of its mill could have been pleaded and proved as a counterclaim. One of the grounds of jurisdiction in equity is the prevention of a multiplicity of suits. The <sup>364</sup> court below, sitting in equity, had taken jurisdiction of the parties and of the subject matter of this suit for a necessary purpose—for the purpose of determining the validity of the lien claimed, and of enforcing or cancelling it. No reason occurs to us why that court could not have heard and determined the appellant's claims for wasted wheat and for injured walls as well as any court could in the state of Illinois. It is not necessary to a jurisdiction of those claims to compel the appellant, who had been summoned into that court, to answer the claim of the appellee for the performance of this contract, to come into court and prosecute an action at law in the state of Illinois to recover its damages for the incomplete or negligent performance of the terms of the same contract. It is the province and the duty of a court of equity, which has proper jurisdiction and required jurisdiction of a subject matter for a necessary purpose, to proceed and do final and complete justice between the parties, where it can as well be done in that court as in proceedings at law: *Taylor v. Merchants' Fire Ins. Co.*, 104 U. S. 390, 13 L. ed. 187; *Illinois Trust etc. Co. v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 101. The cross-bill, therefore, should not have been dismissed without a hearing of the issues it presented, and the claims pleaded in it should have been considered and decided upon their merits. It prayed for affirmative equitable relief, which was warranted by its allegations, and it enabled the court to grant full relief to all the parties to the original suit and to completely determine all the controversies which grew out of the matters charged in the original bill, which could not have been done upon a hearing of the issues presented by the answer."

We have not overlooked the suggestion of counsel that "The Missouri lien law makes actions to enforce mechanics' liens identical with ordinary civil actions" (Rev. Stats. 1899, sec. 4210), and the Missouri Code of Civil Procedure has abolished all distinctions between actions at law and suits in equity (Rev. Stats. 1899, sec. 539)."



A reading of the opinion will show, however, that it did not go off upon that point but upon the general proposition that it is the duty of a court of equity which has properly acquired jurisdiction of the subject matter, and of the parties to do final and complete justice in relation thereto. This is no new doctrine in this state. It was announced as long ago as *Whipple v. Farrar*, 3 Mich. 436, 64 Am. Dec. 99. See, also, *Miller v. Stepper*, 32 Mich. 194; *Wallace v. Wallace*, 63 Mich. 326, 29 N. W. 841; *Drayton v. Chandler*, 93 Mich. 383, 53 N. W. 558; *In re Axtell's Petition*, 95 Mich. 244, 54 N. W. 889; *George v. Wyandotte Electric Light Co.*, 105 Mich. 1, 62 N. W. 985; *McLean v. McLean*, 109 Mich. 258, 67 N. W. 118. In *Convis v. Citizens' Mut. F. Ins. Co.*, 127 Mich. 616, 86 N. W. 994, the doctrine was restated by Justice Grant, as follows: "When a court of equity has jurisdiction for one purpose, it may retain jurisdiction to settle all disputes relating to the same subject matter between the parties to the suit."

The complainant having brought the parties and the subject matter into the chancery side of the court, we can see no good reason why all the questions in dispute between the parties in relation to the subject matter should not be finally settled.

The decree is affirmed, with costs.

Carpenter, C. J., and McAlvay, Grant, and Hooker, JJ., concurred.

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*In an Action to Enforce a Mechanic's Lien*, the owner of the building may set up as a counterclaim such damages as he has sustained by a failure of the contractor to complete the building according to his agreement: See the note to *Goodman v. Baerlocher*, 43 Am. St. Rep. 904.

## LONG BELL LUMBER COMPANY v. NYMAN

[145 Mich. 477, 108 N. W. 1019.]

**SALES—Acceptance of Goods—Estoppel.**—If, in an action to recover the price of lumber, it appears that the buyer had known several days before its arrival that it had been ordered in his name and on its arrival he was notified thereof, and that it was in his name, and he then ordered it turned over to the person to whom it was ordered, but several months thereafter disclaimed having ordered it at all, it is a question for the jury whether under the facts his acts constitute an acceptance of the lumber so as to bind him for its price, and whether he is estopped to deny such acceptance, although it does not appear except by inference that he had knowledge that an order for the lumber had been given. (pp. 313.)

**EVIDENCE—Presumption as to Letters and Telegrams Sent.**—Letters mailed and telegrams sent in due course of business are presumed to have been received in like manner by the addressee, while such presumption is rebuttable, the question whether it has been rebutted in a particular case is one of fact for the jury to determine. (p. 313.)

L. H. Titus and W. J. Barnard, for the appellant.

T. J. Cavanaugh, for the appellee.

<sup>478</sup> McALVAY, J. Plaintiff, a Missouri corporation, doing business at Kansas City, Missouri, brought suit against defendant, who was a lumber dealer residing at Bangor, Michigan, in the circuit court for Van Buren county, to recover the price and value of one carload of yellow pine lumber, which it is claimed was shipped by it to defendant and received by him. The facts and circumstances of the shipment are as follows: In November, 1902, plaintiff received from J. B. Graves Co., wholesale lumber dealer at Benton Harbor, Michigan, an order to ship by rail to defendant at Bangor this bill of lumber, giving dimensions, number of pieces, with prices. Plaintiff proceeded to fill the order, and shipped the same by rail December 19, 1902, and, at the same time, an invoice of the lumber shipped by Illinois Central car No. 82,883, amounting to three hundred and five dollars and fifty-five cents. With this invoice, plaintiff claimed, was a letter notifying defendant of the shipment, calling attention to some particular pieces, asking that the same be carefully <sup>479</sup> checked over on arrival, and plaintiff be advised as to any discrepancy. The car was delayed on the road for a long time, and during that time plaintiff

ceived three telegrams purporting to be signed by defendant. The first read:

"Bangor, Mich., Jan. 6, 1903.

"Send me routing Illinois Central car 82,883, also shipping bill. Are joice shipped? Where are they?

"R. C. NYMAN."

The second:

"Bangor, Mich., Jan. 14, 1903.

"Joice not here. Can you locate and push them?

"R. C. NYMAN."

The third:

"Bangor, Mich., 1-30-'03.

"Mr. Kellar notifies me will not want joice after February second. Where are they?

"R. C. NYMAN."

In response to the first telegram plaintiff wired:

"Kansas City, Jan. 7, 1903.

R. C. Nyman, Bangor, Mich.

"Invoice mailed. Are tracing car. Will rush all possible."

In answer to second telegram from defendant plaintiff claims a letter was written on the same date. In all, plaintiff claims to have written ten letters in regard to the shipment, and asking payment therefor. The last one being notice of a draft made for the amount. All mailed in the ordinary course of business. None of these letters were produced as requested of defendant, and carbon copies were introduced in evidence. Defendant was called as a witness for plaintiff, and admitted receiving the invoice, and two or three letters. The waybill was received at Bangor by the railroad company February 26th, and the car arrived March 2, 1903, as appears from the records of the company. On the day the car arrived the <sup>480</sup> agent notified defendant who, as the agent testified, told him to deliver it to Mr. McKellar for the schoolhouse, and further testifies defendant "said the car was ordered in his name, and wasn't for him, it was for the schoolhouse." The agent delivered the car to McKellar, who receipted for it and paid the freight. Defendant testifies that he told the agent he had nothing to do with it, that it was McKellar's. The draft was sent to the bank with notice to defendant of that fact, April 22,

1903. The draft was not paid. On June 15, 1903, defendant wrote plaintiff: "Yours of the 12th received. This I have nothing to do with; never ordered the lumber, never had anything to do with any part of it. I have given your correspondence to McKellar. He was the contractor that had the job of building the schoolhouse. Think the man in Benton Harbor ordered the lumber for him and it shipped to me."

This is the only letter defendant wrote plaintiff. The record does not show that defendant knew of the order given by J. B. Graves Co. to plaintiff. It appears that McKellar was a contractor building a schoolhouse, and needed certain lumber which could not be obtained there. Defendant testified that members of the lumber association would not ship to contractors; that McKellar was obliged to have it shipped to some dealer, and wanted to ship two or three carloads in defendant's name. Two carloads were shipped from Benton Harbor through Graves in that way, with defendant's permission. He afterward learned that the carload of suit was shipped in the same way, and he knew that when this lumber came it was to be used in the schoolhouse. Defendant offered no evidence. Both parties requested the court for an instructed verdict. The court granted defendant's request, and instructed a verdict of no cause of action. A judgment was accordingly entered.

Plaintiff on writ of error asks this court to reverse the judgment, alleging that the court erred in taking the case from the jury, claiming that a verdict should have been <sup>481</sup> instructed for plaintiff, or that the case should have been submitted to the jury under charges requested by plaintiff which were refused. It is clear to us that it was a case for the jury. There was evidence tending to show that a carload of lumber had been received by defendant, and that he ordered to be delivered to McKellar. It is admitted that it arrived at Bangor billed to him, and that he was once notified. If the jury believed the evidence of the notification agent, it could not have found that there was an acceptance of the property by the defendant, and it would make no difference by whom it had been ordered. It does not appear except by inference that defendant at the time he ordered for the lumber was given had knowledge of it; but it is admitted that he received the invoice and at least two

three of the letters written by plaintiff, and the car number given in the invoice was used in a telegram in defendant's name. As to the many letters written by plaintiff and mailed in due course of business, the presumption is that they were received by defendant. This presumption may be rebutted by evidence, but whether it was rebutted or not is a question of fact for the jury: 1 Greenleaf on Evidence, 15th ed., sec. 40; Hedden v. Roberts, 134 Mass. 38, 45 Am. Rep. 276; Huntley v. Whittier, 105 Mass. 391, 7 Am. Rep. 536. The same applies to the telegram sent by plaintiff to defendant.

The invoice, mailed January 5, 1903, on its face stated that plaintiff sold to defendant the lumber in question. All of the letters to defendant are of the same import. The invoice and all letters defendant admits he received were turned over to McKellar by him. The first evidence of any repudiation of the transaction by defendant occurred April 2, 1903, when the draft was refused, and the first writing to that effect was June 15, 1903. In connection with these facts, the court should have instructed the jury as to the duty resting upon a party to speak when by silence another acting in good faith is misled: Bigelow on Estoppel, 5th ed., p. 570; Cleveland Co-operative <sup>482</sup> Stove Co. v. Mallery, 111 Mich. 43, 69 N. W. 75. Also, as to what amounts to the ratification of the unauthorized act of a stranger: Saveland v. Green, 40 Wis. 431; Heyn v. O'Hagen, 60 Mich. 150, 26 N. W. 861. All of the requests to charge the jury, asked by plaintiff, were drawn in accordance with the views herein expressed, and should have been given substantially as requested.

The judgment is reversed, and a new trial ordered.

Carpenter, C. J., and Grant, Blair and Moore, JJ., concurred.

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*There is a Presumption* that letters duly mailed are received by the addressee. This presumption, however, is rebuttable: Garland v. Gaines, 73 Conn. 662, 84 Am. St. Rep. 182; Jensen v. McCorkell, 154 Pa. 323, 35 Am. St. Rep. 843; Pennypacker v. Capital Ins. Co., 80 Iowa, 56, 20 Am. St. Rep. 395; German Nat. Bank v. Burns, 12 Colo. 539, 13 Am. St. Rep. 247; Phelan v. Northwestern L. Ins. Co., 113 N. Y. 147, 10 Am. St. Rep. 441. A similar presumption is indulged in case of the sending of a telegram: Perry v. German-American Bank, 53 Neb. 89, 68 Am. St. Rep. 593; Eppinger v. Scott, 112 Cal. 369, 53 Am. St. Rep. 220.

*The Essentials of an Equitable Estoppel* are stated in the cases of *Supreme Tent etc. v. Stensland*, 206 Ill. 124, 99 Am. St. 137; *Hunt v. Reilly*, 24 B. I. 68, 96 Am. St. Rep. 707; *St. Williams*, 131 Ala. 56, 90 Am. St. Rep. 17; *Wampal v. Kountz*, Dak. 334, 86 Am. St. Rep. 765.

## THROOP v. RUSSELL.

[145 Mich. 482, 108 N. W. 1013.]

**LIMITATIONS OF ACTIONS—New Promise.**—An acknowledgment of a debt, in order to be sufficient to remove the bar of a statute of limitations, must contain an unqualified and direct admission of a present subsisting debt, which the party is liable and willing to pay, and be unaccompanied by any circumstance or declaration which repels the presumption of a promise or intention to pay (p. 317.)

**LIMITATIONS OF ACTIONS—New Promise.**—A letter by the maker to the payee of a note against which the statute of limitations has run, stating that the fact that the note has outlived necessity has entered into the matter, that he will try to raise a certain sum more than the face of the note, if the payee will surrender it, and that if in the future the latter needs any money, the maker of the note will endeavor to give it to him, and is not "backing up or repudiating anything," is a conditional promise and does not remove the bar of the statute of limitations. (p. 318.)

E. T. and J. H. Wood, for the appellant.

R. L. Aldrich, for the appellee.

**483** McALVAY, J. Plaintiff brought suit March 2, 1893, against defendant in the Wayne circuit court upon certain promissory notes and interest at the rate of 8 per cent, made and executed August 13, 1892, as follows: One for \$500 due one year after date; one for \$740 due two years after date and one for \$729 due three years after date. On the \$500 note there were several indorsements of \$100 each, the last of which is dated September 20, 1894. Payments were made on the two other notes. Defendant pleaded the general issue, and gave notice of the statute of limitations. It is admitted that the notes on their face were barred by the statute. Appellant claimed that the bar of the statute had been removed by new promises in writing made by defendant. The notes and the letters which were claimed to contain such new promises were offered in evidence by the plaintiff. No evidence was offered by defendant. The

judge held that the language of the letters could not be construed as amounting to an acknowledgment of indebtedness and a new promise to pay, and instructed a verdict for defendant.

The only question in the case is whether the court erred in his construction of the letters, and in directing a verdict. Plaintiff lived in Toledo and defendant in Detroit. The notes were given in settlement between them of a certain business venture in which they had been engaged. The correspondence upon which plaintiff relies was had between them in October, 1902.

Plaintiff wrote defendant October 7th: <sup>484</sup> "Kindly get me the abstract on those lots of mine as soon as possible and give it to Mr. Wood. I may be able to get the money I want on them here, and if so will want the abstract. Do not give up trying to get for me in Detroit, as I may fall down on it here. I am counting on your paying the \$500 on the first of Nov., as I'll have to have it or will not be able to do as I want to."

Defendant answered October 14th: "I will have the abstract out of Burton's office and will deliver to Mr. Wood. Please let me know whether or not you have the loan. I do not like to ask people to loan money when I do not know whether or not the loan will be needed. I am working hard; next week will have auction sale that I am certain will give me money to pay you. I have made money all year, but it is hard to get cash when I want it. Will write you again in a few days."

Plaintiff wrote again October 16th: "Yours of the 14th inst. received, and in reply will say that I have not been able to make the loan here as I hoped when I wrote you before, so leave it to you to get it for me, and I hope you will be able to get more than \$500.00 on the lots, as I need the money. I send the deed to Mr. Wood the first of the week. . . . I think I told you that I must have the money by Nov. 1st, or it's all off with me, so keep things stirred up and be Johnny on the spot."

Defendant wrote October 27th: "I suppose you have wondered why I did not answer your last letter. I waited, because I wanted to know just what I could do. I have bent all my work to get money for you, and it was not till today that I was sure. I will be able to send you \$500.00 for my-

self on the 1st, and I have no doubt I will be able to send you \$500 on the lots."

Defendant wrote again October 29th: "Now in regard to our matter. Yesterday I was offered cash for a piece of property here that I had not figured on selling till next year in the spring or summer. The offer was about \$1,500 less than I had figured on getting, but I wanted to get cleared up and thought you would <sup>485</sup> be willing to help. You will, of course, remember the nature of the deal. . . . I agreed to take entire responsibility for everything, and included in the notes even salary to you for the time we were together. Of the Toledo lots, everything I received went to clear up the indebtedness, and I still owe \$500 to pay. Should I pay the notes on the basis you proposed, I would be out on the deal altogether about \$1,000 in cash, more or less, and you would have had a much better investment for your money than if it had been in the bank. As I look back at it, the division of loss does not seem proper. Of course, you have my notes. I think they are outlawed, but that question need not enter into the matter. If you will say that you will take \$1,000 now, and give me back the notes, I will endeavor to make sale I spoke of in the first part of letter. If you do so and in the future you need any money I will endeavor to give it to you. In this matter I have tried this over try to put yourself in my place. Remember I am not backing up or repudiating anything. In any way looking at it I cannot but think I made a mistake of inexperience and youth in giving the notes. Now that I am older and see that others do not use me that way I feel that I have a right to endeavor to lighten my burden."

Plaintiff answered this letter November 3d: "I was much surprised when I read your proposition, and I do not feel that I can accept it. These notes have been running a long time and you have not paid anything on them and it has been very hard for me, as I have needed the money, but I have not pushed you, and I feel that I have done all I could. I made you a good offer in Detroit and you accepted it, and that more than took off the item of salary which was the only thing I wanted. I hope you will get the money for me on my lots, and also send me the agreed \$500 on the notes at once, as I have been waiting for it, before I can do anything here, and I agree to make good Nov. 1."



In the foregoing letters of defendant everything is given which bears upon the notes in question. Letters written by plaintiff are given because he claims that as part of the correspondence they are material. These are the writings which plaintiff claims amount to a new promise on the part of defendant. In his brief plaintiff fairly and clearly states the proposition before us in this case.

<sup>486</sup> "The question then is: Has Mr. Russell in his letters to Mr. Throop made such new promises as to constitute an acknowledgment of the debt sufficient to remove the bar of the statute and revive the debt for six years from the date of such letters?"

In this state the law is well settled as to what constitutes a new promise in writing sufficient to remove the bar of the statute. This court has said: "Whenever a new promise is set up to remove the bar of the statute, it ought to be proved in a clear and explicit manner, either expressly, or in such unqualified acknowledgment as authorizes its implication. . . . And although it is held no set form of words is requisite to constitute a sufficient acknowledgment, and that it may be inferred from facts without words; yet the acknowledgment ought to contain an unqualified and direct admission of a present subsisting debt which the party is liable and willing to pay and be unaccompanied by any circumstances or declarations which repel the presumption of a promise or intention to pay": *Ten Eyck v. Wing*, 1 Mich. 40, and cases cited.

This is the leading Michigan case and the learned judge in the able opinion cites and digests the leading English and American authorities. This case has been accepted as the law in this state upon this question.

In the case at bar the writings of defendant relied upon as a sufficient acknowledgment to create a new promise are all set forth above. The letters from plaintiff which are given in this opinion, and to which the letters of defendant are answers, make no direct mention of the notes in question except the last one in answer to the proposition of settlement. The letter of October 29th, written by defendant, is the one upon which plaintiff places most reliance. The entire part material to the case has been quoted. Defendant, in portions not necessary to give in this opinion, states

how the indebtedness on the notes arose, and his financial condition. He says: "Of course you have notes. I think they are outlawed, but that question not enter into the matter. <sup>487</sup> If you say you will \$1,000.00 now and give me back the notes I will endeavor to make sale I spoke of in first part of letter. If you do and in the future need any money I will endeavor to get it to you. In thinking this over put yourself in my place. Remember I am not backing up or repudiating anything."

We construe this to be a proposition by defendant, who knew the notes were outlawed, that if the plaintiff would surrender them he would pay him \$1,000.00. To this proposition plaintiff replied: "I was very much surprised to read your proposition and I do not feel that I can accept it."

The proposition was conditional; it contains no promise to pay unless the condition was accepted, and we do not construe it as a waiver of the right to rely upon the defense of the statute.

In the case of *Rumsey v. Settle's Estate*, 120 Mich. 379, N. W. 579, relied upon by plaintiff, and in which this court held that the letters of decedent contained a new acknowledgment and promise to pay, the letters state, "I will say this every cent I owe you will be paid," and, ". . . and I will pay you. Now I want to fix your matter up in some way; if you like, give you a new note, or if you think a note worth nothing, what will you take in cash, and balance all I owe you?"

It will be noticed that in the first letter, written before the notes were outlawed, there is an explicit acknowledgment of the indebtedness and a promise to pay, which the court held would prevent the running of the statute for ten years thereafter, and the second letter, written two years before that time expired, was to the same effect and operated in the same way. It will be seen that *Rumsey v. Settle's Estate*, 120 Mich. 372, 79 N. W. 579, is easily distinguished from the case at bar.

In the case of *Halladay v. Weeks*, 127 Mich. 363, 89 Am. Rep. 478, 86 N. W. 799, the promise was held to be a conditional one and not sufficient to comply with the statute.

Our conclusion is that the circuit judge was right <sup>488</sup> holding that under the decisions the evidence of

was not such an acknowledgment of the indebtedness that a promise to pay could be inferred therefrom.

Carpenter, C. J., and Grant, Blair and Moore, JJ., concurred.

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*On Acknowledgments or New Promises to suspend the running or remove the bar of the statute of limitations, see the extended note to Warren v. Cleveland, 102 Am. St. Rep. 75.*

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## DETROIT NATIONAL BANK v. UNION TRUST COMPANY.

[145 Mich. 656, 108 N. W. 1092.]

**BANKS AND BANKING—Insolvency—Certified Checks—Burden of Proof.**—In an action against the receiver of an insolvent bank on a fraudulent certified check the burden of proof is on the holder to show that he is a bona fide holder. (p. 320.)

**BILLS AND NOTES—Bona Fide Purchaser of Commercial Paper.**—The rule that where one has notice of facts which would put an ordinarily prudent man upon inquiry, he cannot be considered a bona fide purchaser if he neglects to take such care of his own interests as an ordinarily prudent man would do, does not apply to commercial paper. (p. 322.)

**BILLS AND NOTES—Bona Fide Purchase.—Notice of Facts** which would be sufficient to arouse the suspicion of an ordinarily prudent man is not enough to preclude good faith in a purchase of commercial paper. (p. 323.)

**BILLS AND NOTES—Bona Fide Purchaser.**—If, on the issue as to whether a certified check was purchased upon an honest belief of the validity of the certification, there is evidence having a tendency at least to show grounds of suspicion as to the honesty of the transaction, the question should be submitted to the jury for determination. (pp. 324, 325.)

**BILLS AND NOTES—Bona Fide Purchase of Certified Check—Evidence.**—On the issue as to whether a certified check was purchased upon an honest belief of the validity of the certification, all evidence connected with the transaction naturally raising doubt of such belief, such as knowledge of the purchaser of the standing, methods and dealings of the drawer of the check and the bank upon which it was drawn, the volume of similar business done, the terms upon which it was done, whether such transactions were ordinary or usual in their character, and that the business done with the drawer was not communicated to, or known by, the purchaser of the check, is admissible. (p. 325.)

**PRACTICE.—Unfair Argument of Counsel** to the jury is ground for setting aside the verdict. (p. 328.)

**BILLS AND NOTES—Bona Fide Purchaser—Range of Examination.**—On the issue as to whether a purchaser is a bona fide holder of commercial paper, his witnesses may be cross-examined

at length upon such question although they were not examined upon that subject in the direct examination. (p. 329.)

**BILLS AND NOTES—Certified Checks—Fraud—Evidence.** An action by a bank upon a fraudulently certified check, that much more money was advanced to the drawer of the check than such bank was empowered to loan, and that similar checks than such bank was empowered to loan, and usurious interest was charged, though not invalidating the claim, are admissible in evidence on the issue whether the transaction was a legitimate discount of a certified check or a mere loan. (p. 329.)

H. A. Harmon and Gear, Martin & Butler, for the claimant.

Bowen, Douglas, Whiting & Murfin, and J. C. Donahoe, for the appellee.

<sup>663</sup> **HOOKER, J.** The City Savings Bank of Detroit closed its doors and went into the hands of a receiver, on account to the failure of its vice-president, Frank C. Andrews. The Detroit National Bank filed a claim against it, based on two checks, drawn by Andrews, certified by the assistant cashier of the city bank, and discounted by Andrews at the Detroit National Bank. The case was tried by a jury, and a verdict was found for the defendant, and the claimant appealed.

The case must ultimately turn upon the bona fide purchase of the checks, and as the more important assignments of error relate to that question, we will discuss it first.

<sup>664</sup> 1. It is not disputed that the certificates were fraudulent, being made when Andrews had no funds in the city bank, and it was incumbent upon the plaintiff to show that it was a bona fide holder: See *Thompson v. Village of Costa*, 127 Mich. 522, 86 N. W. 1044, and cases cited therein, Mich. 175, 104 N. W. 694. The claimant made a prima facie showing, by the testimony of its officers, that they took the paper for value, and in good faith, honestly believing that the drawer had an adequate deposit in the city bank at the time of the certification, and it is claimed that this showing was not disputed, and therefore that the court was in refusing to direct a verdict for the plaintiff. This is well taken, provided there is no testimony contradictory to that mentioned.

Defendant's counsel say that there is such testimony, but we will allude to it in a general way. The assistant ca-

of the city bank, on cross-examination (which we may parenthetically remark was, in our opinion, opportune and proper), testified to the fraudulent character of the certification. De Graff, claimant's cashier, who discounted these checks, testified at length, upon cross-examination, that during November and December, 1901, and January and February, 1902, the claimant received from Frank C. Andrews many of his checks certified by the city bank, some of which were paid, through the clearing-house, others being withheld from clearings for a day or so, at Andrews' request, and some taken care of otherwise by him, and that in such cases interest or a bonus was charged him by claimant. Of the latter class, the aggregate in January was \$1,311,000, those that went through the clearing-house amount to \$1,236,000. There were twenty-one of these checks in both classes. The total amount of certified checks was \$6,220,000. Drafts on New York being given for some or all of these checks, interest was charged as upon a loan up to the time of payment of the check. It is claimed that these charges were usurious and furnished a motive for these transactions. During the same time Andrews was drawing <sup>665</sup> large checks upon the Detroit National Bank (overdrawing his account largely) in favor of the city bank, and it was claimed by counsel that this was a pernicious practice, known to banks as "kiting checks," and must have been known and acquiesced in by the claimant; that Andrews' practice of overdrawing upon claimant continued until he was notified that he must not do it, without advising claimant. It was further shown that plaintiff's cashier knew that Andrews was speculating in stocks during this time, and had heard that he lost some money on Amalgamated copper, which the claimant was taking as collateral, and may have known of its value. The cashier testified that his assistant cashier criticised the method of doing business with Andrews.

On behalf of the defendant, Andrews testified that he asked that the checks be withheld for the reason that the bank had not the money to pay them. He further stated that he was requested to get the checks certified. Claimant's assistant cashier testified to cautioning the cashier against the business being done with Andrews, and on one occasion, the cashier said he wondered whether a given certificate was bona fide.

It is a general rule applicable to transactions not involving commercial paper that where one has notice of a defect which would put an ordinarily prudent man upon inquiry, he cannot be considered a bona fide purchaser, if he neglects to take such care of his own interests as an ordinarily prudent man would do, but that rule has not been applied to commercial paper. In *National Bank of Republic v. Young*, 41 N. J. Eq. 531, 7 Atl. 488, the court said:

"The transaction upon which this conclusion was based was as follows: By the testimony of Buckley, who was vice-president of the bank and personally acted for the bank in negotiating the loan of December 31st, it appears that on the 28th or 29th of December, in an interview with the president of the crucible company, the latter told him that Fowler, Crampton, & Co. held some \$600,000 of borrowed paper of the crucible company. Upon this testimony the vice-chancellor remarked that the notice was ~~not~~ amply sufficient to put him upon inquiry; it was such as would have led a prudent man, taking reasonable care of his own interests, to make further inquiry.' And in the statement of principle by which his judgment should be governed the vice-chancellor laid down the doctrine of the law to be that 'notice or knowledge, in this connection, does not mean that the maker of the paper must bring home to its holder actual knowledge of the infirmity which renders the paper void, but it will be sufficient if it is shown that he had the means of knowledge; that is, that he had notice of such facts as would have led a prudent man to further inquiry, and that inquiry, if pursued, would have disclosed the infirmity of the paper.'

"This statement of the doctrine of notice in its effect with respect to the bona fide character of a transaction, as a general rule, is undoubtedly correct; but it is inapplicable to negotiable commercial paper, which, in virtue of its negotiable character, and the need of sustaining its negotiable quality, cannot be impeached in the hands of a subsequent holder taking it for value before maturity, unless his title was acquired under such circumstances as show actual fraud in the party so taking it.

"In *Gill v. Cubitt*, 3 Barn. & C. 466, the court of king's bench held that the title of the holder of commercial paper was impeached so as to let in defenses to which such paper would have been subject in the hands of the original payee.

where it appeared that he had taken it under circumstances 'which ought to have excited the suspicion of a prudent and careful man.' But the doctrine of that case has been overruled in England and in the supreme court of the United States, and generally in the courts of sister states; *Goodman v. Harvey*, 4 Ad. & El. 870; *Goodman v. Simonds*, 20 How. (U. S.) 343, 15 L. ed. 934; *Murray v. Lardner*, 2 Wall. (U. S.) 110, 17 L. ed. 857; 1 *Daniel on Negotiable Instruments*, sec. 775."

We have held several times that notice of facts which would be sufficient to arouse the suspicion of an ordinarily prudent man is enough to preclude good faith in a purchase. It is a matter of *mala fides*: *Stevens v. McLachlan*, 120 Mich. 285, 79 N. W. 627; *Fredonia Nat. Bank v. Tommei*, 131 Mich. 674, 92 N. W. 348; *Glines v. State Sav. Bank*, 132 Mich. 638, 94 N. W. 195; *Thompson v. Village of Meosta*, 141 Mich. 175, 104 N. W. 694.

<sup>667</sup> A learned discussion of the subject will be found in the case of *Jones v. Gordon*, L. R. 2 App. Cas. 627, where Lord Blackburn, rendering the opinion, is reported to have said:

"I should be extremely sorry to say anything which should cast doubt upon the principle that a bill of exchange, or a negotiable instrument of that sort, is negotiable to the fullest extent of its kind. The negotiation of these bills of exchange, in a mercantile country like this, is of very great value. . . .

"Farther, my lords, I think it is right to say that I consider it to be fully and thoroughly established that if value be given for a bill of exchange, it is not enough to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances which might have led a man to suspect that. All these are matters which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defense to an action upon a bill of exchange. I take it that in order to make such a defense, whether in the case of a party who is solvent and *sui juris*, or when it is sought to be proved against the estate of a bankrupt, it is necessary to show that the person who gave value for the bill, whether the value given be great or small, was affected with notice that there was something wrong about it when he took

it. I do not think it is necessary that he should have known of what the particular wrong was. If a man, knowing the bill was in the hands of a person who had no right to it, should happen to think that perhaps the man had stolen it, when if he had known the real truth he would have found not that the man had stolen it, but that he had obtained it by false pretenses, I think that would not make any difference, if he knew that there was something wrong about it and took it. If he takes it in that way, he takes it at his peril.

“But then I think that such evidence of carelessness and blindness as I have referred to may, with other evidence, be good evidence upon the question which, I take it, is the real one, whether he did know that there was something wrong in it. If he was (if I may use the phrase) honestly blundering and careless, and so took a bill of exchange for a bank note when he ought not to have taken it, still he would be entitled to recover. But if the facts and circumstances <sup>are</sup> are such that the jury, or whoever has to decide the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had some suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer, or a stupid man, but because he thought in his own secret mind—I suspect there is something wrong, and if I ask questions and make further inquiry, it will not only be my suspecting it, but my knowing it, and then I shall not be able to recover—I think that is dishonesty. I think the courts, that that is established not only by good sense and reason, but by the authority of the cases themselves.”

See *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 25 N. E. 402, 10 L. R. A. 676, and our own case of *Good v. McDonald*, 77 Mich. 486, 43 N. W. 1019, where it is held that bad faith may be inferred from testimony not direct and positive, proof of those kinds being frequently unobtainable. See, also, *Peirson v. McNeal*, 137 Mich. 158, 100 N. W. 1019, and cases cited. There are many similar cases, some of which will be found in the briefs.

Were this question before us in an equity case, upon the merits, we should necessarily consider the weight of the testimony pro and con. Upon this record we can determine whether the circumstances, taken together,



to show mala fides, whether a jury might legitimately find from them that the plaintiff's cashier did have a suspicion that this was a fraudulent certification, and "refrained from making inquiry lest he should know that it was so," and therefore properly a question for the jury. The burden being upon the plaintiff to establish bona fides (see *Thompson v. Village of Mecosta*, 127 Mich. 522, 86 N. W. 1044, 141 Mich. 175, 104 N. W. 694), the question was one for the jury, if plaintiff's testimony was contradicted. We think that it was disputed by circumstances having a tendency to show grounds of suspicion at least, and of a character which made the subject a question for the jury, justifying a verdict for the defendant, if the circumstances shown convinced them that plaintiff's cashier did not entertain <sup>an</sup> honest belief that Andrews had the requisite deposit at the time of the purchase. The crucial question being whether the checks were purchased upon an honest belief of the validity of the certification, any testimony connected with the transaction, naturally raising doubt of such belief, was admissible. It was competent to show the knowledge of plaintiff's officers as to the pecuniary standing, methods, and dealings of Andrew and the City Savings Bank, the volume of similar business done, and the terms upon which it was done, and whether transactions were ordinary or usual in their character. It was proper to show that the business done with Andrews was not communicated to or known by plaintiff's directors.

The plaintiff had a right to a fair, temperate and impartial consideration of the question, whether its cashier discounted these checks in the honest belief that Andrews had a deposit in the city bank at the time, equal in amount to the checks. That is all there was of the case. It was not a question depending upon the condition of the plaintiff bank, or whether, when its business was closed up, its stockholders received \$125 for each share of stock. Based on a question merely (for the witness did not answer it in the affirmative, and for that matter it would have been no better had he done so), counsel for the defendant argued that the bank had paid its stockholders one hundred and twenty cents on the dollar, or more. He said:

"This controversy is not between the Detroit National Bank and the Union Trust Company; the question for you to

determine is whether these stockholders of the bank was wound up and paid its stockholders one hundred twenty cents on the dollar, or more than that, so far, or depositors of the City Savings Bank are going to get money that is now here in litigation. . . .

"And the testimony shows that the stockholders of bank had received for every \$100 worth of stock \$120 at least before this suit was brought; in other words—

"Mr. Geer.—I desire to take an exception to that.

"Mr. Whiting.—I thought that would come. That is the million dollars of stock that they originally had in bank, before commencement of this suit, they had received \$1,200,000, and there is more to come, because it not been wound up. Of course, he will object to it. that came from that reliable witness, Mr. De Graff—

"Mr. Geer.—I think I have a right to take an excep

"Mr. Whiting.—Certainly he has a right to make objection, and I have a right to comment on it.

"The Court.—Note an exception to it.

"Mr. Whiting.—Let him make all the objections he wants. I tell you the testimony is just as I say. Mr. De Graff told me, and if counsel had listened, he would have heard it, the stockholders received at least \$120 for every \$100 worth of stock of the bank. So that, if the suit is brought in the name of the Detroit National Bank, it is brought by those who are to benefit by it, and those are the stockholders in that bank. It is brought against the receiver of the City Savings Bank, not against the bank but against the receiver, because under the state law the commissioner of banks was caused to be appointed a receiver for the City Savings Bank when he found that through Andrews it was necessary to put it out of business. The receiver represents not alone the stockholders, but he represents the depositors, the savings depositors, and the commercial depositors of the City Savings Bank, and on the 10th of February, 1902, when the bank's doors were closed, the depositors of the City Savings Bank held claims against that bank for money which the bank had had of about \$3,000,000. Of those, about 1,600,000 or 1,700,000 were savings depositors, the rest, about 1,400,000 or 1,500,000 were commercial depositors. Those are the people whom this receiver represents and who are really in fact the defendants in this case.

"Mr. Geer.—To that I object.

"Mr. Whiting.—The depositors of the City Savings Bank—

"Mr. Geer.—I desire to object to that argument, because it is wholly immaterial to this issue.

"The Court.—Note an exception.

"Mr. Whiting.—The stockholders of the City Savings Bank; and when the depositors are paid in full, when the depositors get that \$3,000,000 and they get the expenses of the receivership paid, then the stockholders of the City Savings Bank are going to get something, but not until then. This is the condition as it exists, and that <sup>671</sup> is the actual circumstance under which this suit is brought. What is it brought for? To recover on two checks drawn by Frank C. Andrews on the City Savings Bank and claimed to have been certified by the City Savings Bank. Mind that word 'certified' means what this man Schrage did by writing on the face of the check. Let me take the checks.

"Mr. Geer.—I have not got them. [Mr. Harmon hands papers.]

"Mr. Whiting.—That is what that means when we say certified, it applies to 'Good, Schrage, Teller.' Look at that and at the other one. There is nothing magical about that. That was all that there was meant by certification, that little expression, 'Good, Schrage, Teller.' They seek to recover from the City Savings Bank, or from the receiver of the City Savings Bank, the amount of these two checks, and they say it is \$160,000. Of course, you would not know it, or I would not know it if we looked at the papers, because the papers are for \$100,000 and for \$110,000, and they pretend to claim that there has been \$50,000 paid on one of them, and that there is only \$60,000 due on it. That is the one there. They want to receive from your hands, from this bank—a verdict against that bank for \$160,000, and five per cent interest for three years.

"Mr. Geer.—To that I take an exception.

"Mr. Whiting.—There is about \$8,000 a year of interest besides the face of these checks. The legal rate of interest in this state happens to be five per cent, and the interest on this \$160,000 at the legal rate is what they seek to recover at your hands; if they don't, I want to know it; counsel has objected to it, but when he gets up to tell you

about it he will tell you that they want the \$160,000 interest, and that is about \$8,000 a year, and if you it for three years, that is for \$24,000 more than the of these checks, making it \$184,000, that they are a before these \$3,000,000 of depositors get anything."

We have seen that the rule is not different where claim is against the estate of a bankrupt than in o cases: See *Jones v. Gordon*, L. R. 2 App. Cas. 627; it would shock the sense of justice of any impartial pe should this court announce the doctrine that the jury v at liberty to determine that the plaintiff should not cover, <sup>672</sup> for the reason that it was solvent, while creditors of the city bank were poor. It would have b error had the trial judge said so. Yet this is the running through the argument. Counsel are officers court. They are learned in the law. They have the portunity of acquiring a high appreciation of fairness justice. They should not have made such unfair argum to the jury. The courts, and men whose interests are fore the courts, have a right to have cases tried fa and that appeals calculated to arouse the sympathies prejudices of jurors, who do not as a rule discrimin closely when the opportunity offers to bestow charity the expense of litigants, be not made. If counsel can restrain themselves from making unfair appeals, we l no alternative but to set aside the verdicts thus obtain and we owe it to the cause of common justice to sever condemn the practice, whether it is the result of un excitement and zeal merely, which palliates it, or t deliberate premeditated intention to obtain an undue vantage. We have spoken more plainly and at length u this subject than we have ordinarily done, not because arguments of counsel in this case have exceeded in propriety those made in many other cases, but because the necessity arising from abuses, the increase of w comments heretofore made have proven inadequate to ch We have attempted to stigmatize the practice as it deser and as every practitioner looks upon it, when he is m its victim, with a view to its correction, to which ev circuit judge should be assiduous, and in which we besp the moral support of the members of the bar, who are p sonally quite as much interested as the judges can be.

There are many assignments of error which we must of necessity omit to discuss at length. We cover many of them when we say that it was competent for the defense to show the prior transactions of the parties, and plaintiff's knowledge of Andrews' pecuniary circumstances, business, and methods of doing business.

<sup>672</sup> We think it was competent for counsel for the defendant to cross-examine at length the witnesses of the plaintiff upon the question of bona fides, though they were not examined upon that subject in the direct examination. We have no doubt that the record is much larger than it need have been, and that much of the testimony was of little value and might have been properly omitted upon the trial, but this did not necessarily amount to a cause for reversal. Comment was made on the fact that much more money was advanced to Andrews, on the certified checks, than the bank was authorized to loan. That certainly did not of itself invalidate plaintiff's claim, nor did any usurious charges made, but if, as appears to be claimed, these transactions were really loans to Andrews, instead of a legitimate discounting of certified checks, they were circumstances to be considered upon the main question.

It was proper to impeach De Graff by the testimony of Stewart. It was also competent to show by Stewart, as part of the *res gestae*, that at the time of taking a certified check De Graff expressed doubt of its validity, if such was the proof. It would of course be incompetent to show admissions of De Graff as such.

We think that it was competent to offer evidence tending to show printed official statements of the city bank, brought to the knowledge of the plaintiff's officers, containing an item of only \$10,000 of certified checks, when plaintiff's officers must have known that it held a much greater amount of such checks at the time.

We think it unnecessary to refer to the assignments of error upon the charge, as the discussion of the other assignments will suffice.

The judgment is reversed, and a new trial ordered.

McAlvay, Blair, Montgomery, and Ostrander, JJ., concurred.

*The Purchaser of Negotiable Paper*, for value and before maturity not bound at his peril to be on the watch for facts which put a cautious man on his guard: *Second Nat. Bank v. Westcott*, N. Y. 520, 76 Am. St. Rep. 283; *Manhattan Sav. Inst. v. New Nat. Ex. Bank*, 170 N. Y. 58, 88 Am. St. Rep. 640. It has affirmed that negligence on his part in making inquiries will deprive him of his character as a bona fide holder: *Central Bank v. Spurlin*, 111 Iowa, 187, 82 Am. St. Rep. 511; *Merrill v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246. Yet it would seem a purchaser of a negotiable instrument is not entitled to protect as a bona fide holder if he has such credible information, or is placed in such a situation, as would have put a reasonable man on inquiry, and which, if made, would have disclosed the defenses to: *Shirk v. Neible*, 156 Ind. 66, 83 Am. St. Rep. 150. However, authorities throw doubt on this proposition: *Richards v. Monro*, Iowa, 359, 39 Am. St. Rep. 301; *Second Nat. Bank v. Morgan*, Pac. 199, 44 Am. St. Rep. 652; *Borgess Investment Co. v. Vetter*, Mo. 560, 64 Am. St. Rep. 567. The bona fide ownership of negotiable paper is discussed further in the notes to *Bedell v. Herring*, 1 St. Rep. 309; *Sims v. Lyles*, 26 Am. Dec. 156.

### SPURR v. TRAVIS.

[145 Mich. 721, 108 N. W. 1090.]

**CONSTITUTIONAL LAW—Sales of Merchandise in Bulk.**—A statute making void as to creditors a sale of a stock of merchandise in bulk in certain cases and applying to residents and nonresidents alike is not unconstitutional as depriving a person of his property without due process of law, or as being class legislation in operation against merchants alone, nor because it does not include within its terms sales by merchants who owe no debts. (p. 331.)

**CONSTITUTIONAL LAW—Police Power—Right to Sell Property.**—If, in the exercise of the police power, a beneficial result is sought, and legislation is enacted in the protection of rights of property, and, without due process of law, or as being class legislation in operation against the citizen in a legal sense, or depriving him of property because it involves regulations which may postpone for a reasonable time the exercise of his right to sell his property, such legislation is unconstitutional. (p. 333.)

**CONSTITUTIONAL LAW—Sales of Merchandise in Bulk.**—A statute making void as to creditors a sale of a stock of merchandise in bulk in certain cases, and including regulations which may postpone for a reasonable time the exercise of the right of the indebted merchant to sell his stock of goods in bulk, is a valid exercise of the police power, and is not an unconstitutional invasion of personal liberty or of property rights. (p. 333.)

A. H. Perkins, for the appellants.

W. E. Brown, for the appellee.

<sup>721</sup> MONTGOMERY, J. This case involves the question of <sup>722</sup> the validity of the "sales in bulk act," so called, being act No. 223 of the public acts of 1905. The circuit judge held the act valid, and defendants have brought the case before us for review on writ of error.

The material portion of the act reads as follows: "The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller, transferrer or assignor, shall be void as against the creditors of the seller, transferrer, assignor, unless the seller, transferrer, assignor and purchaser, transferee and assignee, shall, at least five days before the sale, make a full detailed inventory, showing the quantity and, so far as possible with exercise of reasonable diligence, the cost price to the seller, transferrer, and assignor of each article to be included in the sale; and unless the purchaser, transferee and assignee demands and receives from the seller, transferrer and assignor a written list of names and addresses of the creditors of the seller, transferrer and assignor, with the amount of indebtedness due or owing to each, and certified by the seller, transferrer and assignor, under oath, to be a full, accurate and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee and assignee shall, at least five days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof."

It is the contention of the appellant that this statute violates section 32, article 6 of the constitution of the state, which provides that no person shall be deprived of life, liberty, or property without due process of law. It is also contended that the act violates section 1 of article 14 of the amendments to the federal constitution, by denying to the vendor and vendee respectively the equal protection of the laws of the state, and by abridging their respective privileges and immunities as citizens of the United States.

**723** There is no invasion of the fourteenth amendment discriminating between citizens of different states. The terms of the act are equally applicable to residents and nonresidents, so that this is not class legislation in that sense: *People v. Gay*, 107 Mich. 422, 65 N. W. 292, 3 L. R. A. 464.

It is contended that the act is class legislation for several reasons: 1. Because it limits its operation to merchants and does not include farmers, manufacturers, etc.; and 2. 'It does not relate to merchants who owe no debts.

A sufficient reason for not including within its provisions merchants who owe no debts is found in the apparent purpose of the act, which is to protect creditors. If there is no creditor, there is no one requiring protection. It would be a novel application of the doctrine which forbids class legislation to hold that creditors of such merchants as are not creditors may not be protected by regulation of transactions by such merchants because the provisions cannot properly be made applicable to others having no creditors.

Nor is it class legislation within the meaning of that term as used to express an unconstitutional exercise of power to limit the application of the act to a particular class or calling or relation: *People v. Bellet*, 99 Mich. 151, 41 L. R. A. 589, 57 N. W. 1094, 22 L. R. A. 696.

In *Cooley on Constitutional Limitations*, seventh edition, page 554, it is said: "Laws public in their objects and general in their application, unless express constitutional provision forbids, be either general or local in their application. They may embrace many subjects or one, and they may extend to all citizens or be confined to particular classes, as minors, or married women, bankers or traders, and the like. . . . If the law is otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply; and they are to be public in character and of their propriety and policy the legislature must judge."

See, also, *McDaniels v. Shoe Co.*, 30 Wash. 549, 94 L. R. A. 889, 71 Pac. 37, 60 L. R. A. 947.

**724** It is easy to discover reasons for apprehending that the act is class legislation for the purpose of guarding against fraudulent disposition of stocks of merchandise by debtor owners which would not relate to all species of property. As was said in the case cited above



"it is well known that the business of retailing goods, wares, and merchandise is conducted largely upon credit, and furnishes an opportunity for the commission of frauds upon creditors not usual in other classes of business." The act is not class legislation: See, also, *Ripley v. Evans*, 87 Mich. 217, 49 N. W. 504; *People's Building etc. Assn. v. Billing*, 104 Mich. 186, 62 N. W. 373.

Does the act conflict with section 32 of article 6 of the constitution? It may be conceded that an act which should prohibit the sale of property of any character, either generally or for a stated time, without any adequate purpose or object, would constitute such an interference with the property and liberty of the individual as is inhibited by this section. The courts have, however, never treated this or similar provisions as prohibitive of legislation in the exercise of the police power which regulates the manner of the use or disposition of property, even though a temporary inconvenience may be suffered by the owner. An illustration of this is afforded by the laws providing liens in favor of mechanics. Many other illustrations might be given, but it is, we think, safe to state, as a general rule, that where, in the exercise of the police power, a beneficial result is sought, and legislation is enacted in protection of rights which would, but for the enactment, be subject to defeat, such legislation does not infringe the liberty of the citizen in a legal sense or deprive him of property because it involves regulations which may postpone for a reasonable time the exercise of his right to sell. It is to be noted that in case of an owner who owes no debts no delay is required. A sale may be had at once. The owner of merchandise who is also a debtor may at once qualify himself to make a sale by discharging his indebtedness, but, if he does not, this act postpones the sale until notice is given to the creditors. <sup>725</sup> In our belief this is within the police power, and does not constitute an unconstitutional invasion of liberty or property rights. Laws similar to the one under consideration have been enacted in twenty states of the Union. This is significant of a general belief that transfers of the character sought to be regulated afford peculiar opportunities for the perpetration of fraud upon creditors. While this general course of legislation in sister states is in no sense controlling, it may afford evidence of a consensus

of opinion that some legislation is necessary to meet a fest, if not a growing, evil.

What is more significant is that the courts of other states have dealt with the question here presented, and that the decided weight of authority sustains the validity of the legislation. The courts of Massachusetts,\* Connecticut, Tennessee, and Washington have upheld this law: *McIntosh v. Shoe Co.*, 30 Wash. 549, 94 Am. St. Rep. 889, 71 L. R. A. 37, 60 L. R. A. 947; *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; *Walp v. Mooar*, 76 Conn. 51, 41 Atl. 277; *Squire v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312. The constitutionality of similar acts has been assumed by the supreme court of Wisconsin in *Fish v. Herrmann*, 118 Wis. 424, 95 N. W. 392, and in *Maryland v. Hart v. Roney*, 93 Md. 432, 49 Atl. 661. The court of appeals of New York, by a bare majority, held such an act unconstitutional in *Wright v. Hart*, 182 N. Y. 330, 75 L. R. A. 404, 2 L. R. A., N. S., 338. In the case of *Block v. Schwab*, 27 Utah, 387, 101 Am. St. Rep. 971, 76 Pac. 22, 65 L. R. A. 308, an act somewhat similar was declared unconstitutional by the supreme court of Utah, but the court cited and distinguished the cases from Massachusetts, Tennessee, and Washington, and seem to rest their decision upon two grounds: 1. That the statute of Utah, unlike the Massachusetts and Washington statutes, failed to exempt the operation of its provisions persons acting in fiduciary or official capacity under judicial process; and 2. Because the Utah statute made it a criminal offense for both purchaser and seller to act in making a sale and purchase in disobedience or disregard to its provisions. It was noted that our statute is not subject to either of these objections. The supreme court of <sup>726</sup> Indiana, in *Selle v. Hayes*, 163 Ind. 422, 72 N. E. 119, leaves the question undecided. The supreme court of Ohio has held a similar act invalid: *Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 101. It will be seen that the weight of authority sustains the validity of this act. As in our opinion the act is on principle within the police power, we find ourselves in accord with the weight of authority.

The judgment is affirmed.

Grant, Blair, Ostrander, and Moore, JJ., concurred.

*Statutes Regulating the Sale of Goods in Bulk* are discussed in relation to their constitutionality in the note to *Black v. Schwartz*, 101 Am. St. Rep. 986, and in the subsequent cases of *McKinster v. Sager*, 163 Ind. 671, 106 Am. St. Rep. 268; *Squire v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322. For recent decisions construing such statutes, see *Rothchild Bros. v. Trewella*, 36 Wash. 679, 104 Am. St. Rep. 973; *Kohn v. Fishbach*, 36 Wash. 69, 104 Am. St. Rep. 941. The sale of the horses, harnesses, carriages and other property in a livery-stable does not fall within a statute providing that it shall be the duty of every person who purchases a stock of goods, wares or merchandise in bulk to demand and receive of the vendor a verified statement of the names and addresses of all his creditors and the amount due, or to become due, to each: *Everett Produce Co. v. Smith Bros.*, 40 Wash. 566, 111 Am. St. Rep. 979.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MINNESOTA.**

**JAMES QUIRK MILLING COMPANY v. MINNEAPOLIS  
AND ST. LOUIS RAILROAD COMPANY.**

[98 Minn. 22, 107 N. W. 742.]

**CONTRACT—When Against Public Policy—Burden of Proof.**  
The party who asserts that a contract is against public policy has  
the burden of proving the same. (p. 337.)

**CONTRACT—Exemption from Liability for Negligence.**  
A contract which forbids a person to protect himself by contract from  
damages resulting from his own negligence applies only when the  
contract protects him against the consequences of a breach of the  
duty imposed by law. (p. 338.)

**CONTRACT—Exemption of Railroad from Liability for Damages.**  
Where a railroad company grants a privilege to erect a grain elevator  
on its right of way, a condition in the contract that it shall not  
be liable to the elevator company for damages caused by its engines  
resulting from the operation of its engines is not against public  
policy, and is therefore binding on the parties. (p. 341.)

William H. Hallam, for the appellant.

John I. Dille, for the respondent.

**22** ELLIOTT, J. The appellant under a contract with the  
railway company erected a grain elevator upon its right of  
way. The building was destroyed by **23** fire negligently  
caused by the company's locomotives. The action was brought  
to recover the resulting damages, and the trial court sustained  
a demurrer to the complaint. The appeal is from the  
order.

The elevator was constructed under a contract between the  
parties which contained the following provision: "In con-  
sideration of the rights hereby acquired the second

agrees . . . to protect, save harmless, and indemnify the railroad company, its successors and assigns, from liability to any person, corporation or company, for or on account of any loss or damage by fire communicated by or escaping from any locomotive, engine or car, or resulting in any manner from the construction or operation of said track."

The appellant contends that this contract is against public policy, and therefore void. This involves the denial of the right of the parties to enter into such agreement. Public policy requires that the right to contract shall be preserved inviolate in ordinary cases. It is denied only when the particular contract violates some principle which is of even more importance to the general public.

As said by Sir George Jessel, M. R., in *Printing & N. R. Co. v. Sampson*, L. R. 19 Eq. 462, 44 L. J. Ch. 705: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."

In *Baltimore etc. Ry. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. Rep. 385, 44 L. ed. 560, the court said: "It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, <sup>24</sup> unless it clearly appear that they contravene public right or the public welfare."

It follows that the party who asserts that a particular contract is against public policy has the burden of proving the same: *Printing & N. R. Co. v. Sampson*, L. R. 19 Eq. 462, 44 L. J. Ch. 705; *Rousillon v. Rousillon*, L. R. 14 Ch. D. 351; *United States v. Trans-Missouri Freight Assn.*, 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73; *Hartford Fire Ins. Co. v. Chicago etc. Ry. Co.*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A.

193; *Stewart v. Erie & Western Transp. Co.*, 17 Minn. (372).

The appellant assumes that there is a general rule of which forbids a party to protect himself by contract against damages resulting from his own negligence. But this is only when the contract protects him against the consequences of a breach of some duty which is imposed by law. Generally a person may waive the right of action which he has against another for an injury received from the negligence of the latter, provided the contract of waiver is supported by a consideration deemed valuable by law and procured without mistake or fraud, such as would avoid other contracts. 1 Thompson on Negligence, sec. 182.

In *Hartford Ins. Co. v. Chicago etc. Ry. Co.*, 175 U. S. 91, 20 Sup. Ct. Rep. 33, 44 L. ed. 84, Justice Gray, stating the rule applicable to public carriers, said: "The plaintiffs further insisted that the same reasons apply universally and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his faulty conduct. But the only authorities cited which support this proposition are a general statement in *Cooley on Torts*, 387, and an obiter dictum in *Johnson v. Richmond etc. Ry. Co.*, 86 Va. 975, 978, 11 S. E. 829, and it is certainly too sweeping. Even a common carrier may obtain insurance against loss occasioned by the negligence of himself or of his servant, and may by stipulation with the owner of goods carried have the benefit of such insurance procured thereon by such owner." *Minneapolis etc. Ry. Co. v. Home Ins. Co.*, 64 Minn. 61, 1 N. W. 132; *Phoenix Ins. Co. v. Erie & Western Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. Rep. 750, 29 L. ed. 873; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. Rep. 365, 33 L. ed. 730; *Wager v. Providence Ins. Co.*, 10 U. S. 99, 14 Sup. Ct. Rep. 55, 37 L. ed. 1013.

<sup>25</sup> The right to insure against loss by fire occasioned by the negligence of the insured is no longer questioned: *Livermore & Great Western Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469, 32 L. ed. 788; *Kerr on Insurance*, 375. A stronger illustration is found in the recognized business of insuring employers of labor against damages resulting from personal injuries occasioned by the negligence of the insured.

Exceptions to the general rule which protects the freedom of contract are made in some instances, especially such as involve the relation of master and servant and the transactions of railway companies when acting as public carriers of persons and property. Positive and peremptory duties are imposed upon public carriers. Public policy requires that contracts which relieve from these absolute duties shall be held null and void. The law imposes upon a railway company the absolute duty to operate its railways, to employ suitable men to operate them, and to exercise ordinary care to furnish them a reasonably safe place to work and with reasonably safe machinery and appliances with which to perform their work. The obligation is imposed by law, and does not arise out of contract. Any breach of this duty, therefore, is a violation of the law which imposes the duty. It follows that a contract which exempts the carrier from damages resulting from negligence in the discharge of these duties is void, because it relieves it of an absolute duty which the law imposes upon it, and because it unreasonably endangers the lives of employes and passengers.

The parties to such contracts do not stand upon an equal footing. The law imposes upon the company the absolute duty to accept passengers and freight when offered, and to carry the former with the utmost and the latter with ordinary care. The traveler is often obliged to travel and the shipper to send his goods by railway. A person cannot stop to settle the terms and to negotiate a contract every time he desires to use a railway. On the other hand, a railroad, with its trained employes and monopoly of transaction facilities, has the power to exact any contract it desires. This inequality in the situation of the parties would, if permitted, enable the company to obtain unfair contracts, and the fact that a contract which exempts the company from liability for negligence relieves it from an absolute duty imposed by law and increases the danger to the lives and property of <sup>26</sup> the people constitutes the reason for the rule that such contracts are against public policy: *Hartford Fire Ins. Co. v. Chicago etc. Ry. Co.*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193.

Entirely different conditions are presented by the case at bar. In making the lease in question the railway company was dealing with individuals in reference to the use of its

property only remotely, if at all, connected with its business as a common carrier. No law imposed upon it the duty of leasing a portion of its right of way to the appellants. The railway holds its station grounds and right of way for public use for which the company was incorporated, and as its private property, and to be occupied by itself or others in the manner which it may consider best fitted to promote or not to interfere with the public use. It may, in its discretion, permit them to be occupied by others with structures convenient for the receiving and delivering of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers": *Hartford Fire Ins. Co. v. Chicago etc. Ry. Co.*, 175 U. S. 92, 20 Sup. Ct. Rep. 44 L. ed. 84; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 23 L. ed. 356; *Osgood v. Central Vt. Ry. Co.*, 77 Vt. 33 Atl. 137, 70 L. R. A. 930. The laws of this state authorize the condemnation of a part of the right of way of a railway company for the erection of a public warehouse and elevator. Laws 1893, c. 64, p. 177; Gen. Stats. 1894, secs. 7724-7727. Rev. Laws 1905, secs. 2106-2113.

But the appellant did not resort to this procedure, which would have made its elevator a public enterprise and subject to public regulation: *Stewart v. Great Northern Ry. Co.*, 65 Minn. 515, 68 N. W. 208, 33 L. R. A. 427. It chose rather to enter into a private contract with the railway company and to release it from liability for damages occasioned by fire which might escape from its engines. For this waiver of the right of action it must have received some benefit which it deemed the equivalent of the right of action which it waived. The company was under no legal obligation to make the lease. It might leave the appellant to its right to proceed under the statute and accept the obligations arising out of the relation thus created. The company would not be liable for damages to property placed upon its right of way by strangers without its permission, caused by fires occasioned by its want of ordinary care. Having the right to release<sup>27</sup> to make the contract, it might stipulate for exemption from damages caused by its negligence in setting fire to the property which the lessee placed upon the leased premises. Placing the building upon the right of way was an inconvenience to the railway company and increased the danger of fire



its own property. In the absence of the stipulation in question, the risks and liabilities of the company would have been materially increased. As the contract in no way relieves the railway company from the discharge of any absolute duty which it owes to the public or to any citizen, it is not against public policy, and is therefore binding upon the parties.

The authorities, without exception, sustain this view: 3 Elliott on Railroads, sec. 1236; Griswold v. Illinois C. Ry. Co., 90 Iowa, 265, 57 N. W. 843, 24 L. R. A. 647; Stephens v. Southern Pac. Co., 109 Cal. 86, 50 Am. St. Rep. 17, 41 Pac. 783, 29 L. R. A. 751; King v. Southern Pac. Co., 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755; Kansas City etc. R. Co. v. Blaker, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81; 1 Am. & Eng. Ann. Cas. 883; Greenwich v. Louisville & N. R. Co., 112 Ky. 598, 99 Am. St. Rep. 313, 66 S. W. 411, 67 S. W. 16, 56 L. R. A. 477; Wabash R. Co. v. Ordelheide, 172 Mo. 436, 72 S. W. 684; Hartford Fire Ins. Co. v. Chicago etc. Ry. Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193, on appeal, 175 U. S. 91, 20 Sup. Ct. Rep. 33, 44 L. ed. 84; Baltimore etc. Ry. Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. Rep. 385, 44 L. ed. 560; Osgood v. Central Vt. Ry. Co., 77 Vt. 334, 60 Atl. 137, 70 L. R. A. 930; Richmond v. New York etc. R. Co., 26 R. I. 225, 58 Atl. 767; Woodward v. Ft. Worth & D. C. R. Co., 35 Tex. Civ. App. 14, 79 S. W. 896; Mann v. Pere Marquette, 135 Mich. 210, 97 N. W. 721; Quimby v. Boston & M. R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; Russell v. Pittsburgh etc. Ry. Co., 157 Ind. 305, 87 Am. St. Rep. 214, 61 N. E. 678, 55 L. R. A. 253; Texas & Pac. Ry. Co. v. Watson, 190 U. S. 287, 23 Sup. Ct. Rep. 681, 47 L. ed. 1057.

The order appealed from is affirmed.

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*A Covenant Against Liability for Fire in a lease by a railroad company of land adjoining its depot grounds is valid: Stephens v. Southern Pac. R. R. Co., 109 Cal. 86, 50 Am. St. Rep. 17. And if a railroad company grants to another permission to build on its right of way on condition that it shall not be liable for loss by fire caused by its locomotives, the condition is valid, and neither the owner of the building nor an insurance company which has paid the loss by fire can recover from the railroad company, in the absence of willful or wanton negligence on its part: Greenwich Ins. Co. v. Louisville etc. R. R. Co., 112 Ky. 598, 99 Am. St. Rep. 313.*

## LARSON v. O'HARA.

[98 Minn. 71, 107 N. W. 821.]

**BROKER—Authority to Sell Land, When not Implied.**—employment of a broker to find a purchaser for certain land on prescribed terms does not authorize him to execute a contract of (p. 344.)

**EARNEST MONEY—When may be Recovered.**—If a tract to convey land is unenforceable, and the vendor refuses to convey, the earnest money paid under such contract may be recovered (p. 345.)

Ray G. Farrington, for the appellant.

H. W. Stark and W. E. Rowe, for the respondent.

<sup>71</sup> ELLIOTT, J. This action was brought to compel specific performance of a contract to convey real estate and to recover damages alleged to have been caused by the defendant's failure and refusal to carry out and perform her agreement to convey. As the case was tried, the action was treated by all parties as one for damages. It appears to have been tried by the court and a jury without objection. At the close of the evidence the court directed a verdict for the plaintiff and the defendant appeals from an order denying her motion for a judgment in her favor notwithstanding the verdict and for a new trial.

The first and second assignments of error cannot be considered. No exceptions were taken to the rulings of the court and no errors were assigned in the motion for a new trial. By a liberal construction <sup>72</sup> of the other assignment we are enabled to determine whether the evidence is sufficient to support the verdict.

Prior to March 7, 1905, the appellant, Mary J. O'Hara, was the owner of eighty acres of land situated near Crookston. The Odett & Ball Land Company was a partnership engaged in business as real estate brokers. On November 26, 1904, Mrs. O'Hara wrote to these parties, stating that she would accept three thousand eight hundred dollars net cash for the land in question, provided they could sell it by January 1, 1905. On January 25, 1905, evidently in reply to an offer, she again wrote to them that she would accept three thousand six hundred and seventy-five dollars for the land

allow them a commission of eighty dollars for making the sale. On January 30, 1905, she wrote again, suggesting or agreeing to some modifications in the terms of payment. On January 31st the brokers telegraphed her: "Letter received. Party accepts your offer. All cash. See letter."

On the same day they wrote Mrs. O'Hara a letter and inclosed a check for one hundred and fifty dollars "as earnest money for the purchase of the land." In this letter they stated that "the party to whom we are selling this land was in to-day and we showed him your letter and he accepted your proposition, but will pay all cash as soon as the contract is completed."

Directions were then given Mrs. O'Hara with reference to the preparation of the abstract and other papers connected with the proposed transfer. On February 2d the Odett & Ball Land Company, assuming to act for Mrs. O'Hara, signed a written contract of sale of the land to the plaintiff, Larson, which contained the terms and conditions of the sale. The action is based upon this contract.

Mrs. O'Hara never directed the execution of the contract, and never saw it until it was produced at the trial. She received the letter of January 31st inclosing the check, and on February 2d replied that she would furnish an abstract and would send the deed as directed. She then, in the same letter, informs them that she had purchased the land from P. J. McGuire, and at the time of the purchase had agreed to reconvey the land to McGuire at any time within three years upon the <sup>73</sup> performance of certain conditions and the payment of a debt due from McGuire to her. She stated that the three years had expired, and that McGuire had not complied with the conditions and that his rights under the contract had been forfeited, and that, if necessary, she would go into court and have the contract annulled. She expressly informed the land company that she wished the purchaser to "perfectly understand" the matter, and it is evident that she intended that the sale of the land must be subject to whatever rights McGuire still had. On February 10th she wrote that McGuire had claimed the right to perform his contract, and that she therefore returned the one hundred and fifty dollars. Soon after the money was returned the plaintiff commenced this action.

Upon this evidence we are satisfied that Mrs. O'Hara n authorized the brokers to execute a contract for the sale of the land. Their authority was limited to finding a purchaser who was willing to buy on the terms fixed by the owner. *Stillman v. Fitzgerald*, 37 Minn. 186, 33 N. W. 564. As held by Vice-chancellor Pitney in *Keim v. Lindley* (N. J. E. 30 Atl. 1063, "the mere employment of an ordinary real estate broker to effect a sale of a parcel of land, even though the price and terms be prescribed, does not amount to giving present authority to such broker to conclude a binding contract for the same. Moreover, such authority is not usually to be inferred from the use by the principal and broker in that connection of the terms for sale or to sell and the like. Those words in that connection usually mean no more than to negotiate a sale by finding a purchaser upon satisfactory terms." There is nothing in the correspondence from which it may properly be inferred that Mrs. O'Hara intended to confer unusual authority upon the brokers. Her letter of February 2d contained full information with reference to the actual condition of the title, and directed them to convey this information to the prospective purchaser. But the contract had been executed before this letter was received.

The authorities with practical unanimity hold that the employment to find a purchaser for certain land on prescribed terms does not authorize the broker to execute a contract of sale: *Hamer v. Sharp*, L. R. 19 Eq. 108; *Prior v. Moore*, L. T. 624; *Chadburn v. Moore*, 61 L. J. Ch. 674; *Wild v. Watson*, L. R. 1 Ir. 402; *McCullough v. Hitchcock*, 71 Conn. 401, 42 Atl. 81; *Stewart v. Pickering*, 73 Iowa, 74 652 N. W. 690; *Furst v. Tweed*, 93 Iowa, 300, 61 N. W. 878; *Balk v. Holmes*, 104 Iowa, 399, 73 N. W. 878; *Balk v. Searle*, 116 Iowa, 374, 89 N. W. 1087; *Campbell v. Gray*, 148 Ind. 440, 47 N. E. 818; *Dickinson v. Updike* (N. J. E.), 49 Atl. 712; *Lindley v. Keim*, 54 N. J. E. 418, 34 1073.

By the very decided weight of authority the rule is the same where the broker is authorized "to sell" the land. *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. 258, the court, practically quoting from *McCullough v. Hitchcock*, 71 Conn. 401, 42 Atl. 81, said: "A real estate broker or agent is defined to be one who negotiates the sale of real property. His business generally is only to find a purchaser who is willing

buy the land upon the terms fixed by the owner. He has no authority to bind the principal by signing a contract of sale. A sale of real estate involves the adjustment of many matters besides fixing the price. The delivery of the possession has to be settled; generally the title to be examined, and the conveyance with its covenants to be agreed upon and executed by the owner, all of which require conference and time for their completion. They are for the determination of the owner, and do not pertain to the duties, and are not within the authority of a real estate agent. For obvious reasons, therefore, the law wisely withholds from him any implied authority to sign a contract of sale in behalf of his principal." As supporting this general proposition, see *Brandrup v. Britten*, 11 N. Dak. 376, 92 N. W. 453; *Ballou v. Bergvendsen*, 9 N. Dak. 285, 83 N. W. 10; *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471; *Jones v. Holladay*, 2 App. D. C. 279; *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. 758; *Morris v. Ruddy*, 20 N. J. Eq. 236; *Everman v. Herndon*, 71 Miss. 823, 15 South. 135; *Sullivan v. Leer*, 2 Colo. App. 141, 29 Pac. 817; *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568; *Stillman v. Fitzgerald*, 37 Minn. 186, 33 N. W. 564; *Warvelle on Vendors*, 2d ed., sec. 206; *Mechem on Agency*, sec. 966.

The contract was unenforceable and, Mrs. O'Hara having refused to convey the land, the plaintiff was entitled to recover the amount which he had paid as part of the purchase price: *Payne v. Hackney*, 84 Minn. 195, 87 N. W. 608. The return of the money to the Odett & Ball Land Company did not relieve her from liability to the plaintiff. Although they were without authority to execute the contract of sale, they represented her in the negotiations with Larson, and until the money was returned to Larson it was still in the hands of her agents: See *Thomas v. Moody*, 57 Cal. 215; *Bogart v. Crosby*, 80 Cal. 195, 22 Pac. 84. She admits that she knew the name of the party with whom the agents were dealing.

Order affirmed.

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*Authority to a Broker to Find a Purchaser of specified real property at a certain price does not authorize him to execute a contract of sale to a purchaser whom he finds: Duffy v. Hobson, 40 Cal. 240, 6 Am. Rep. 617. See, too, Delafeld v. Smith, 101 Wis. 664, 70 Am. St. Rep. 938; McFarland v. Lillard, 2 Ind. App. 160, 50 Am. St. Rep. 234.*

**KRAFVE v. ROY.**

[98 Minn. 141, 107 N. W. 966.]

**GARNISHMENT—Debt of Foreign Corporation.**—A debt from one foreign corporation to another, arising out of a contract entered into in this state at an agency maintained by the debtor corporation for the transaction of its business, is subject to garnishment in an action in this state by a resident plaintiff against the creditor corporation whose place of business is in another state. (p. 344.)

**GARNISHMENT—Debt of Foreign Corporation.**—In garnishing a debt due from a foreign corporation having a place of business in this state, it is not necessary affirmatively to show that the garnishee has complied with the statutes imposing conditions which foreign corporations may do business in the state. Compliance with the law in this respect is presumed. (pp. 347, 348.)

Stevens & Stevens, for the appellants.

Harry S. Swensen and Francis H. Clarke, for the respondent.

<sup>141</sup> **BROWN, J.** This action was brought in the municipal court of Minneapolis to recover the value of services allegedly performed by plaintiff. Garnishment proceedings were instituted, and the Winnor-Torgerson Lumber Company made garnishee. On the return day of summons, the garnishee appeared and disclosed that it was indebted to defendant in the sum of two hundred and ninety-three dollars and twenty cents. Defendant, through its attorneys, appeared specially and moved to discharge the garnishee and release the property from the garnishment, for an order dismissing the action on the ground that the court had no jurisdiction over the property of defendant and acquired none by the garnishment of the indebtedness. The motion was denied, and defendant appealed.

It is contended by defendant that the debt due from the garnishee had no situs in the state of Minnesota, and for that reason the court acquired no jurisdiction of the parties to the action by the garnishment proceedings.

<sup>142</sup> It appears from the record that the plaintiff is a resident of this state; that defendant is a corporation, created and doing business in the state of Washington; that the garnishee is a corporation, created under the laws of and having its principal place of business in the state of South Dakota but maintaining an agency in the state of Minnesota.

the transaction of business therein, which agency is in charge of one of its officers. The transaction out of which the indebtedness in question arose took place in this state, and according to the showing made, was payable at Minneapolis; the usual method of payment being by draft upon a bank in this state mailed to defendant at its place of business in Washington. The question presented is whether, under such circumstances, the indebtedness can be reached by garnishment.

We are of opinion that the court below ruled correctly on the proposition. This is not a case where a nonresident debtor comes temporarily into the state and is served with garnishee summons while within its borders. Here, the garnishee, though a nonresident corporation, maintains an agency in the state for the purpose of transacting business therein; and the indebtedness arose out of a transaction occurring in the state with that agency. The authorities sustain the right of garnishment in such cases: *Lancashire Ins. Co. v. Corbetta*, 165 Ill. 592, 56 Am. St. Rep. 275, 46 N. E. 631, 36 L. R. A. 640; *National Fire Ins. Co. v. Ming*, 7 Ariz. 6, 60 Pac. 720; *Pittsburg etc. R. Co. v. Bartels*, 108 Ky. 216, 56 S. W. 152.

It was held in *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 52 N. W. 905, 7 L. R. A. 84, that for purposes of attachment, a debt has a situs wherever the debtor can be found. Wherever the creditor might sue for its recovery, there it may be attached as his property. The place of payment is immaterial. The rule as there laid down, properly limited, is in accord with the general trend of the authorities. The only limitation permissible is to the effect that the rule does not apply to a debtor temporarily within the state; and such was the only qualification or modification that was intended to be suggested by Justice Collins in *McKinney v. Mills*, 80 Minn. 478, 81 Am. St. Rep. 278, 83 N. W. 452. In the case at bar, as already stated, the garnishee was not temporarily within the state, but had a permanent agency therein for the transaction of its business, and the case comes squarely within the rule laid down in the *Harvey* case, as limited and qualified in the *McKinney* case.

<sup>143</sup> It was not necessary that it be affirmatively shown that the garnishee had complied with our statutes imposing conditions upon which foreign corporations may do business in

this state. Compliance with the statutes is presumed in absence of a showing to the contrary: *Lehigh Valley Co. v. Gilmore*, 93 Minn. 432, 106 Am. St. Rep. 443, 10 N. W. 796.

The point is made that the order under review is not appealable. It is clear that an order refusing to discharge a garnishee in an action in which the court has jurisdiction of the parties is not appealable. It is equivalent to an order for judgment against him, and the appeal must be taken from the judgment: *Croft v. Miller*, 26 Minn. 317, 4 N. W. 1027. *Pillsbury v. Foley*, 61 Minn. 434, 63 N. W. 1027. But the defendant, by his motion to discharge the garnishee to dismiss the action, challenges the jurisdiction of the court to proceed further in the action, and the order is appealable: *Plano Mfg. Co. v. Kaufert*, 86 Minn. 13, 89 N. W. 1027. The appeal in *McKinney v. Mills*, 80 Minn. 478, 81 Am. St. Rep. 278, 83 N. W. 452, was from a similar order.

Order affirmed.

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*The Garnishment of Foreign Corporations* is discussed in the following leading cases of Baltimore etc. R. R. Co. v. Allen, 58 W. Va. 112 Am. St. Rep. 975; *Kansas City etc. Ry. Co. v. Parker*, 69 Mo. 401, 86 Am. St. Rep. 205; *Boyle v. Musser-Sauntry Land etc. Co.*, 88 Minn. 456, 97 Am. St. Rep. 538; *Goodwin v. Clayton*, 137 N. C. 107 Am. St. Rep. 479. The situs of debts for purpose of garnishment is discussed at length in the note to *National Bank v. Furtick*, 63 N. C. St. Rep. 113.

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### CABLE v. HOOLIHAN.

[98 Minn. 143, 107 N. W. 967.]

#### EXEMPTION RIGHTS—Loss by Abandonment of Occupation.

Where a butcher and meat cutter leases his tools for two years with the privilege on the part of the lessees to purchase them within one year, and engages in another occupation, he loses his right to claim an exemption of the tools from execution. (p. 349.)

Alfred L. Thwing, for the appellant.

C. L. Pratt, for the respondent.

<sup>144</sup> BROWN, J. For some years prior to May 27, 1907, the plaintiff had been a butcher and meat cutter by trade, his trades being separate and distinct in nature, and was



that day possessed of and using in the exercise of his trade certain tools which were afterward seized and sold by defendant, acting as sheriff, under an execution against him. On the claim that the tools were exempt under the provisions of section 5459 of the General Statutes of 1894, this action was brought against the sheriff for their conversion. Plaintiff had judgment, and defendant appealed from an order denying a new trial.

The only question necessary to be considered is whether the contention of plaintiff that the tools in question were exempt under the statute referred to is well taken. It is claimed by defendant that, conceding the tools to have been exempt on May 27, 1904, plaintiff lost or waived his right of exemption by abandoning the trade and occupation in which they were employed, rendering them thereafter subject to the levy and seizure on execution in favor of creditors. It appears that upon the day stated plaintiff, being then in possession of and using the tools, leased the same to a copartnership for the term of two years, with the privilege on the part of the lessees to purchase the same, at a price named, at their option within one year from the date of the lease. The lessees took possession of the tools, and a short time thereafter defendant levied upon and sold them under an execution against plaintiff. Plaintiff testified at the trial that it was his intention at the time of executing this lease to resume possession <sup>145</sup> of the tools at a future time and continue in the exercise of his trade, and that he had abandoned his trade only temporarily. The court submitted this question to a jury, the jury found that such was his intention, and the court embodied that conclusion in its findings of fact.

Notwithstanding the commendable liberality with which courts deal with exemptions and exemption rights, the claim of plaintiff in this case cannot be sustained without exceeding proper limits and establishing a doubtful precedent. The statute under which the exemption is asserted was intended for the benefit of persons actually engaged in some trade or profession in which the use of tools and instruments is necessary properly to conduct the same, and to enable them while so engaged to provide for themselves and families. It was not intended to apply to a case like that at bar, or to enable a tradesman to claim an exemption after he has quit and

abandoned his occupation. We have found very few authorities bearing directly upon the question, but those to which our attention has been called are to the effect that the abandonment operates as a waiver or loss of the exemption. It is said in 18 Cyclopaedia, 1419, that the tools of a mechanic to be exempt, must be kept for actual use in his trade. It may not be necessary that they be required for immediate use, but if he no longer uses them in carrying on his business, or if he abandons his trade, they are not exempt. The authorities sustain this view: *Norris v. Hoitt*, 18 N. H. 1; *Willis v. Morris*, 66 Tex. 628, 59 Am. Rep. 634, 1 S. W. 7; *Miller v. Miller*, 97 Mich. 151, 56 N. W. 348.

It is clear that the conduct of plaintiff was a complete waiver of his right of exemption. He leased his exempt tools for the period of two years, and gave the lessees the unconditional right to purchase the same within a year, thus disabling himself for at least two years from resuming his trade with these particular tools, and, if the lessees exercised the right, to purchase the same, for all time, and engaged in another calling, that of a traveling salesman. Of course a temporary abandonment of one's occupation will not result in a loss of the right of exemption, when coupled with an intention to resume the same as soon as circumstances will permit: *Harris v. Haynes*, 30 Mich. 140. But no case has been found wherein the right of exemption was sustained upon facts like those at bar. Here we have a definite abandonment for two years, coupled with a conditional sale <sup>146</sup> of the exempt tools. His expressed intention to resume the business can have no force in the face of these facts. He had an undoubted right to sell his tools, and, if he had done so before the levy was made by defendant, they would not have been subject to execution. But the lease and option to purchase, together with the engagement in other employment, was an abandonment of his trade, within the contemplation of the law, and a consequent loss of the right of exemption.

It was unnecessary to plead the facts showing a waiver. The case of *Murphy v. Sherman*, 25 Minn. 196, is not here in point. The waiver held necessary in that case to be pleaded was one arising from the acts of the plaintiff at the time or after the levy had been made. In the case at bar no question of that kind is presented. Here the question is n

strictly speaking, one of waiver, but whether, in view of the prior acts of plaintiff, the right of exemption existed at the time the levy was made.

Our conclusion upon the facts stated is that judgment should have been directed for defendant. But the trial having been before the court, and special issues only having been submitted to a jury, the statute authorizing judgment notwithstanding a verdict does not apply. We can only grant a new trial.

Order reversed and new trial granted.

#### LOSS OF EXEMPTION RIGHTS BY ABANDONMENT OF OCCUPATION.

The right of a person engaged in a particular trade, business or profession to claim as exempt from execution his tools, implements or other property necessary to enable him to pursue his calling, is dependent upon his making use of them in the pursuit of his occupation. The object of the exemption is to enable him to carry on his trade or business, and not to favor him merely because he possesses a particular kind of skill or learning. Therefore, if he voluntarily abandons his occupation, and does not contemplate prosecuting it, his tools, appliances and the like lose their exempt character and are subject to attachment and execution: See the principal case; *Atwood v. De Forest*, 19 Conn. 513; *Miller v. Miller*, 97 Mich. 151, 56 N. W. 348; *Norris v. Hoit*, 18 N. H. 196; *Cutting v. Tappaw*, 59 N. H. 562; *Willis v. Morris*, 66 Tex. 628, 59 Am. Rep. 634, 1 S. W. 799; *Cooper v. Pierce*, 74 Tex. 526, 12 S. W. 211; *McCord-Collins Co. v. Lazarus* (Tex. Civ. App.), 50 S. W. 1048.

Where one absconds, leaving the state or for parts unknown, and thus abandoning his business or occupation, his property theretofore exempt becomes subject to levy: *Bentz v. Breuner*, 106 Mich. 87, 63 N. W. 970; *Orr v. Box*, 22 Minn. 485; *Spence v. Rambusch*, 99 Wis. 676, 75 N. W. 950.

"If a mechanic conceives the design of absconding, and ceases the prosecution of his trade, the moment he leaves his trade his tools and implements become subject to the lien of an unsatisfied execution of an officer": *Davis v. Wood*, 7 Mo. 162.

It is not necessary that the property should in fact be in use at the time of a levy thereon. It is exempt if the owner keeps it with an honest intention of using it, within a reasonable time, to procure a livelihood. The question is whether the property is reasonably required for actual use, either at the time of attachment or within a reasonable time thereafter; and this is a question of fact, to be determined from all the evidence: *Jacquith v. Scott*, 63 N. H. 5, 56 Am. Rep. 476; *Rowell v. Powell*, 53 Vt. 302; *Steele v. Lyford*, 59 Vt. 230, 8

Atl. 736. Thus, if a person purchases a team with a bona fide intention of engaging in the business of a teamster or driver, the horses are exempt, although he has not actually entered into such business: *Cleveland v. Andrews*, 5 Idaho, 65, 95 Am. St. Re. 46 Pac. 1025.

The authorities recognize that one does not lose the benefit of his exemption by a temporary suspension of his occupation with an intention of returning to it as opportunity may offer: *Balch v. Willis*, 123 Mass. 194, 25 Am. Rep. 61; *Harris v. Haynes*, 30 Pa. 140; *Springer v. Lewis*, 22 Pa. 191. "The distinction between a permanent drawing from the pursuit of a particular trade or occupation and a determination never to resume it, and a temporary diversion from its prosecution, while engaged in some other business or occupation, is not intended to be of permanent or durable continuance, but is temporary and definite. To secure to himself the privilege and benefits intended to be conferred by the provisions of the statute, an artisan is required to ply his trade without any possible intermission or interruption, or occurrence of any interruption in its pursuit. If, for instance, owing to the general stagnation of business, he cannot, for a season, find remunerative employment in carrying it on, or if, from personal infirmity or other intervening impediment, it becomes necessary, it is expedient that he should resort to some other department of industry to obtain means of supporting himself and his family, he does not, as long as he entertains an intention to return, as soon as circumstances will permit, to occupation and employment in his trade, be said to have abandoned it. The tools and instruments necessary to carry it on in the usual and ordinary manner in which his business is conducted are in the meantime still things of value to him within the meaning of the law. And they will be protected in his possession against seizure and attachment upon legal process, in order that he may not be deprived of the means of earning, and the application of his labor to pursuits for which he has peculiar qualifications, a livelihood for himself and his family, and thus being a benefit instead of a burden, to the community": *Caswell v. Keith*, 78 N. H. (12 Gray) 351.

Moreover, one's business or occupation may be of an intermittent character, or it may be confined to particular seasons of the year. In such cases it would be an unreasonable interpretation of the statute to hold that the exemption ceases at the end of each week, month, or season, when there is an intention to resume it the next week, month, or season. "The business in fact subsists and continues, although the work thereon is for the time discontinued." The property is exempt, not "only while in fact employed in actual and permanent service and during temporary cessations of that service, but also when it is reasonably necessary for actual use in a business which the debtor in good faith intends to enter upon within a reasonable time": *Jaquith v. Scott*, 63 N. H. 5, 56 Am. Rep. 476.

Where one enlists as a volunteer soldier in time of war, and places his tools with a friend for safekeeping, this does not constitute an abandonment of his trade: *Abrams v. Pender*, 44 N. C. (Bush.) 260. And where a hackman puts his horses out to pasture temporarily, and places his hack with a painter for repairs, he does not lose his exemption rights in such property: *Forsyth v. Bower*, 54 Cal. 639. A threshing outfit, necessary to carrying on the farming operations of the owner upon a large farm, does not cease to be exempt because of its customary use by him for hire to thresh the crops of others, after threshing his own: *Spence v. Smith*, 121 Cal. 536, 66 Am. St. Rep. 33, 53 Pac. 653.

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### BERGER v. TURNBLAD.

[98 Minn. 163, 107 N. W. 543.]

**MECHANIC'S LIEN**—Wrong of Contractor.—Mechanics and Materialmen furnishing labor or materials for a building at the request of the contractor are given by the statute, not simply the right to be subrogated to the rights of the contractor, but an independent right to a lien on the building, which cannot be defeated by the misconduct or fraud of the contractor. (pp. 356, 357.)

**MECHANIC'S LIEN**—Work Done Away from Premises.—It is a general rule that to entitle a mechanic or materialman to a lien the work must be done or the materials delivered on the premises where the building is being erected; but when the material required for a building is specially prepared for it at the shop of the contractor with the consent of the owner, the material is deemed to have been furnished on the premises. (p. 357.)

**MECHANIC'S LIEN**—Work Done in Shop, Rejection of by Contractor.—If a contractor engaged to erect a house employs a mechanic to do the ornamental plastering, and the principal portion of this work is, with the consent of the owner of the building and the contractor, done at the shop of the contractor instead of at the house, in making designs, models and casts exclusively intended for and adapted to ornamental plastering, but the contractor, after the work is completed, without justifiable cause, refuses to permit it to be placed in the building, and it therefore never becomes a part thereof, the mechanic is entitled to a lien on the house and lots for the value of all his labor. (pp. 357, 358.)

Gjertsen & Lund, for the appellants.

Woods, Kingman & Wallace, for the respondent.

<sup>104</sup> **START, C. J.** This is an appeal from a judgment of the district court of the county of Hennepin in favor of the plaintiff, decreeing a lien to the extent of six hundred and

eighty dollars and five cents upon the premises of the defendant Turnblad, hereafter designated as the defendant.

The only question presented by the record for our decision is whether the facts found by the trial court entitled the plaintiff to a mechanic's lien in any sum in excess of one hundred and forty-eight dollars and fifty cents. Such facts, so far as here material, are substantially these: The defendant was engaged in building a house upon his lots. He entered into an agreement with a contractor, doing business in the name of Frank W. Berger & Co., to provide all materials and perform all the labor for the plain and ornamental plastering in the house. In carrying out his agreement the contractor employed his son, the plaintiff, to do certain of the work on the ornamental plastering for the house at an agreed price of fifty-five cents for each hour of work. Pursuant to such employment the plaintiff worked for the contractor fourteen hundred and twenty-one hours, his work ending on July 17, 1905. He was paid therefor only the sum of one hundred and one dollars and fifty cents, leaving a balance of one hundred and eighty dollars and five cents, due from the contractor to him for his work. The contractor actually constructed and placed in the house ornamental plastering to an extent and value not to <sup>105</sup> exceed two hundred and twenty-one dollars, upon which the plaintiff worked two hundred and twenty-one hours. The balance of the work done by the plaintiff was at the shop of the contractor, where he was employed in making designs, models, and casts intended exclusively for and adapted to the construction of the ornamental plastering work in the house. This product of his work was of no value or use for any other purpose than that for which it was intended. It was necessary that such designs, models, and casts should be made preliminary to and as the first steps in the work of constructing the ornamental plastering in the house pursuant to the contract. The defendant retained the contractor for convenience adopted the shop as the place for doing such preliminary work, instead of the premises where the house was being erected, which was there suggested by the defendant's architect. Shortly after the plaintiff had completed such work at the shop the defendant and the contractor had a controversy as to their respective rights and duties under their contract. Thereupon the contractor

without any justifiable cause, refused to proceed with his contract, and although requested by the defendant so to do, he refused to deliver such designs, models, and casts, or any of them, to the defendant, or to permit them to be used in the placing of the ornamental plastering in the house, and no part thereof was ever actually delivered upon the lots of the defendant, or in fact ever became a part of the house.

Do these facts justify the conclusions of law upon which the judgment is based, that the plaintiff performed labor and furnished skill for the erection of the house within the meaning of the statute? The statute then in force (Gen. Stats. 1894, sec. 6229) reads as follows: "Whoever performs labor or furnishes skill . . . for the erection . . . of any house . . . or other building . . . by virtue of a contract with, or at the instance of the owner thereof or . . . his . . . contractor or subcontractor, shall have a lien to secure the contract price or value of the same . . . upon such house and upon the right, title and interest of the owner thereof."

The defendant claims that through no fault of his, but by reason of the wrong of the contractor, he was deprived of all benefit of the plaintiff's labor except to the extent of two hundred and fifty dollars, and that other than this the <sup>106</sup> plaintiff has not performed labor or furnished skill in the erection of the house, and having been paid one hundred and one dollars and fifty cents thereon, he is entitled to a lien for only the balance of one hundred and forty-eight dollars and fifty cents. It is clear that if the failure to place the product of the work of the plaintiff in the house had been that of the defendant and not of the contractor, the plaintiff would be entitled to a lien for the full value of his labor. If such were this case it would be ruled by the case of *Howes v. Reliance Wire Works Co.*, 46 Minn. 44, 48 N. W. 448. It was held in the case cited that, where material required by the contract for the construction of a building was prepared at the yard or shop of the contractor with the express or implied consent of the owner of the building, but was never actually placed in the building by reason of the fault of the owner thereof, such work of preparation and manufacture must be deemed to have been furnished for the construction of the building, and that the contractor was entitled to a lien therefor.

The converse of this proposition is necessarily true, and the failure to place the materials in the building is due to the fault of the contractor, he is not entitled to a lien. In this case, however, while the product of the plaintiff's labor was though made expressly for the building, at the shop of the contractor with the defendant's consent and under his supervision by his architect, yet it never actually went into the house or upon his premises by reason of the wrongdoing of his contractor. Can the wrong of the contractor in this case be imputed to the plaintiff? If the plaintiff's work had been done on the premises or the product thereof had been delivered thereon to be used in the erection of the house, and the contractor had wrongfully taken it away and diverted it to other purposes, his wrong could not be imputed to the plaintiff and his right to a lien would be unaffected by the contractor's wrong: *Burns v. Sewell*, 48 Minn. 425, 51 N. W. 224.

In the last case cited the owner of a lot made a contract with a builder to erect a house thereon. The contractor purchased material to be used in the erection of the house from a third party who delivered it upon the lot, but the contractor removed it from the lot, and never placed it in the building, so that the owner of the lot never received any benefit from the material. It was held that the materialman was entitled to a lien on the lot of the owner notwithstanding that by the wrong of the contractor in diverting the material the innocent owner <sup>167</sup> of the lot never received any benefit from the material. The basis of this holding was succinctly stated by Chief Justice Gilfillan in these words: "Cases may, of course, occur where a dishonest contractor may divert to other purposes material sold and delivered for the purpose of constructing a building. But ordinarily, in such a case, the owner who accredits the contractor and enables him to purchase on the credit of the building and land should suffer, more than the innocent seller of the material."

The necessary inference from the two decisions here cited is that mechanics and materialmen furnishing labor and materials for the erection of a building, at the request of the contractor, are given by the statute not simply the right to be subrogated to the rights of the contractor, but an independent right to a lien on the building and land upon which it stands, which cannot be defeated by the misconduct or



of the contractor. The owner when he enters into a contract with a builder for the erection of a house is deemed to contract with reference to the statute which becomes a part of the contract, and in legal effect he thereby consents that his contractor may, subject to the conditions and limitations of the statute, pledge the credit of the building for the necessary labor and materials for its construction in accordance with the contract: *Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354; *Bohn v. McCarthy*, 29 Minn. 23, 11 N. W. 127; *Bardwell v. Mann*, 46 Minn. 285, 48 N. W. 1120.

It is true, as a general rule, that to entitle a mechanic or materialman to a lien for work performed or materials furnished at the request of the contractor, the work must be done, or the material delivered on the premises upon which the building is being erected. The case of *Howes v. Reliance Wire Works Co.*, 46 Minn. 44, 48 N. W. 448, however, establishes an exception to this rule which is to the effect that where the material required for the erection of a building is specially prepared for it at the shop of the contractor with the consent of the owner, the material is deemed to have been furnished on the premises. The exception ought not to be extended to cases not fairly within the principle upon which it rests, otherwise the door will be opened for fraud or collusion between the contractor and the mechanic or materialman.

The finding of the trial court in this case brings it clearly within the exception, for the work of the plaintiff was, by the consent of the <sup>168</sup> defendant, performed at the shop, and it was there passed upon by the defendant, by his architect, as the work progressed. The defendant and the contractor adopted the shop as the place for doing the work which was necessary to be done in the erection of his house. The plaintiff's right to a lien, then, is exactly what it would have been if he had performed the labor in the preparation of the materials for the erection of the house on the premises upon which it was being built, and the contractor had refused to permit the product of his work to be placed in the house. It follows that the fact that the work was done at the shop and not on the premises does not affect the plaintiff's right to a lien.

This leaves only the question whether the wrongful act of the contractor is to be imputed to the plaintiff whereby his

right to a lien will be defeated. Upon principle it logic follows, from what we have said as to the basis of a mechanic or materialman's right to a lien, that his right cannot be impaired by any misconduct of the contractor to which he is a party. Upon authority it necessarily follows from the decision of this court in the case of *Burns v. Sewell*, 48 Minn. 425, 51 N. W. 224, that the right of an innocent mechanic or materialman to a lien cannot be impaired by the wrong or fraud of the contractor in which he in no manner participated. We therefore hold upon the particular facts of this case that the plaintiff was entitled to a lien for the full value of his work.

Judgment affirmed.

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*Mechanics Employed by a Contractor to work on a house are entitled to a lien enforceable against the property, though the contractor, in violation of his contract, used material of so poor a character that the owner was damaged rather than benefited by the work done and material furnished: Bowen v. Phinney, 162 Mass. 599, 18 Am. St. Rep. 391. See, too, Jarvis v. State Bank, 22 Colo. 399, 44 Am. St. Rep. 129; Wisconsin etc. Brick Co. v. Hood, 67 Minn. 64, 44 Am. St. Rep. 418.*

*One Who Does Work in His Shop on Materials to be used in the construction of a building, and so used, is entitled to a mechanic's lien: Evans Marble Co. v. International Trust Co., 101 Md. 210, 64 Am. St. Rep. 568.*

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## HOYT v. LIGHTBODY.

[98 Minn. 189, 108 N. W. 843.]

**COTENANCY.**—The Rule that the Purchase of a Tax Title by one tenant in common inures to the benefit of all, and that the purchaser is entitled to remuneration only, is based upon a community of interest in a common title creating such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the others in reference to the property so situated. (p. 360.)

**COTENANCY.**—Assertion of Adverse Tax Title.—One who, after purchasing an undivided interest in land, buys tax certificates thereto based on sales made prior to his purchase of the land, and perfects the certificates by elimination of the right of redemption, cannot assert the resulting tax titles adversely to his cotenant. (p. 364.)

**COTENANCY.**—Acquisition of Tax Title.—The Statute of Minnesota permitting the holder of an undivided interest to redeem his estate by paying into the treasury a proportionate amount of the taxes required to redeem the whole, does not necessarily abrogate the general prohibition against the acquisition of a tax title by one cotenant adversely to another. (p. 364.)

**EVIDENCE—Proof of Kinship.**—The evidence of a witness whose knowledge has been derived from an intimate acquaintance with a family is admissible as to such facts of family history as marriage, kinship, name and death. (p. 366.)

John A. Keyes, for the appellant.

S. T. and William Harrison and Francis H. De Groat, for the respondents.

<sup>190</sup> JAGGARD, J. In 1896 the plaintiff and appellant began an action to quiet title to vacant and unoccupied land. Judgment by default in his favor was duly entered therein. Afterward certain of the defendants and respondents in this proceeding applied to the court to open that judgment and permit them to answer. Their application was allowed, and they were permitted to appear and defend: Hoyt v. Lightbody, 93 Minn. 249, 101 N. W. 304. Thereupon all the defendants filed answers, all of which raise substantially the same questions.

<sup>191</sup> Upon trial without a jury the plaintiff asserted title under four tax certificates. The answering defendants claimed to be heirs at law of John Lightbody, deceased, and as such to be entitled to an undivided half of the lands. The plaintiff owned the other undivided interest by virtue of purchase from one McCall. McCall and Lightbody had been tenants in common. The court found, inter alia, the cotenancy between Lightbody and McCall, the transfer by McCall to the plaintiff, the heirship of the defendants as the only children and sole heirs at law of John Lightbody, deceased, the death of his wife before his own decease, the purchase by the plaintiff of the tax certificates based on taxes assessed and sales (except in one case, made anterior to that deed) subsequent to the deed to him by McCall, and the total amount paid by the plaintiff for tax certificates upon the undivided half of the lands owned by defendants, with interest to the date of the finding. It found as conclusions of law that the defendants were the owners in fee of an undivided one-half, and that the plaintiff was the owner in fee of the other one-half; that the plaintiff had a lien upon the defendants' one-half in the amount of principal paid by him for tax certificates and taxes, with interest; and that unless the defendants paid said sum, with interest, the plaintiff might sell the land in accordance with further details of the judgment. From an

order denying plaintiff's motion to amend the findings of fact and conclusions of law, and for a new trial, the plaintiff took this appeal.

1. The determining question in this case is whether plaintiff, being a tenant in common with the defendants, could acquire and hold a tax title on the land adversely to them. In *Easton v. Scofield*, 66 Minn. 425, 69 N. W. 326, this court said: "It is almost universally held that one tenant in common cannot acquire a tax title against his cotenants, and the acquiring of the same only operates as a payment of taxes. . . . The decisions hold that his cotenant is one of the parties whom the purchaser [of a tax title] is 'equitably bound to protect' (within the meaning of General Statutes, 1894, section 1599). It is as much the duty of one tenant in common to pay the taxes as it is of another. Equity holds that one such tenant must protect his cotenant as much as he protects himself. The duty of all is the duty of each in that respect. This equitable principle applies with more or less force to every outstanding claim against the land which one tenant in common may acquire <sup>182</sup> and attempt to enforce against his cotenants." Justice Mitchell concurred in the result on another ground, but said that he was not prepared to assent to the rule as to cotenancy. Inter alia, he said: "But, when the purchasing cotenant is himself free from default in the payment of his own taxes, I fail to see any good reason why he may not bid in at tax sale the interest of his cotenants for his own use, there being in such a case nothing in the relations of the parties imposing any obligation on any tenant in common to pay the taxes upon the moiety of the others." The decision of the majority of the court in that case is in harmony with other rulings of this court more or less directly involved upon the facts presented by the respective records: *Holterhoff v. Mead*, 36 Minn. 29 N. W. 675; *Norton v. Metropolitan Life Ins. Co.*, 74 Minn. 491, 77 N. W. 298, 539.

The plaintiff argues with much force that the question is none the less an open one in this state; that the Minnesota decisions, limited to the particular facts in each case, are inconsistent with the right of this plaintiff to claim title under his tax deeds; and that, in so far as the majority of the court in *Easton v. Scofield*, 66 Minn. 425, 69 N. W. 326,

announced the general rule, it was for a mistaken reason. In the first place, he insists that, on general principles, there is no privity of interest between cotenants, especially where their titles are derived from different sources, which makes one a trustee of the title of the other: See *Vail v. Reynolds*, 42 Hun, 647; *Coster v. Lorillard*, 14 Wend. 265; 2 Blackstone's Commentaries, 191; *Blight v. Rochester*, 7 Wheat. 535, 5 L. ed. 516; *Blackwood v. Van Vleit*, 30 Mich. 118; *People v. Detroit*, 8 Mich. 14, 77 Am. Dec. 433.

A limited privity, however, or a species of fiduciary relation, exists between tenants in common. There is a common possession of every part of the whole between them. They are seised per my et per tout. There is an accountability between them for rents and profits as between each other: 45 Century Digest, "Tenancy in Common," sec. 79. Their obligations in many respects, as with reference to encumbrances, easements, outstanding liens, titles, or claims, are reciprocal: 45 Century Digest, "Tenancy in Common," secs. 53-59, inclusive. They are within the principle that a community of interest produces a community of duty. The rule that the purchase of a tax title by one tenant in common inures to the benefit of all, and that the purchaser <sup>193</sup> is entitled to remuneration only, "arises from the privity subsisting between parties having a common possession of the same land and a common interest in the safety of the possession of each; and it only inculcates that good faith which seems appropriate to their relative position": *Marshall, J., in Venable v. Beauchamp*, 3 Dana, 321, 28 Am. Dec. 74. "This rule is based upon a community of interest in a common title creating such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other in reference to the property so situated": *Justice Miller, in Rothwell v. Dewees*, 67 U. S. 613, 17 L. ed. 309. The overwhelming weight of authority is to this effect, and accords with the majority opinion in *Easton v. Scofield*, 65 Minn. 425, 69 N. W. 326; 45 Century Digest, "Tenancy in Common," secs. 60, 61, 96; *Black on Tax Titles*, 2d ed., sec. 282; 2 *Cooley on Taxation*, 2d ed., 966.

It is difficult to see how the plaintiff has strengthened his case by showing that the taxes were assessed or that the tax sales were made before he acquired his interest, and at a time

when he stood in no relation to the defendants concerning the land and had nothing to do with either the lands or the defendants. If his grantor, McCall, was disabled to acquire a tax title against his cotenant, that grantor could not put his grantee in any better position than he occupied himself. With respect to the tax liens on the property the grantee stood in just the position that the grantor occupied: *Gilfillan v. C. J.*, in *MacEwen v. Beard*, 58 Minn. 176, 59 N. W. 976. And see *Washington Loan etc. Co. v. McKenzie*, 64 Minn. 66 N. W. 976. It is, as counsel for defendants argues, automatic that a person can convey no more nor better title than he has, no matter what form the instrument of conveyance may have.

In the second place, the plaintiff insists that the present case comes within a well-defined and established exception to the general rule; and that when one cotenant has paid half the taxes assessed on land in which he has an undivided one-half interest, and when he had never sustained any other relation of tenancy or other contract dealings with the other cotenants of his grantor, he might subsequently to the purchase when he became a cotenant with other persons set up against them an adverse title based on tax liens which accumulated before his purchase, although matured into a title after his purchase.

<sup>104</sup> The authorities on which he relies do not sustain his contention. Thus *Lybrand v. Haney*, 31 Wis. 230, determines the right of one in possession of land to acquire and assert a tax title, and did not at all involve the present question of cotenancy. In *Miller v. Donahue*, 96 Wis. 498, 71 N. W. 900, it did not appear that the relationship of cotenancy existed when the tax deed was acquired, nor did the other cotenant object to its assertion. On the contrary, the Wisconsin court adheres to the general rule of inhibition against the assertion of an adverse tax title by a cotenant against another: *Hannig v. Mueller*, 82 Wis. 235, 52 N. W. 98. See also *Roberts v. Thorn*, 25 Tex. 728, 78 Am. Dec. 552, sustained the acquisition of a patent, not of a tax title, by one who was a cotenant with another under a worthless title. Nor is the contention of plaintiff justified by his other authorities which recognize that under peculiar circumstances there may be a relation of trust and confidence between cotenants which prohibits the acquisition and assertion of an adverse tax title.

one cotenant as against another. The review of authorities for the exception to the general rule in general and vague terms to be found in *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422, 41 N. E. 931, is expressly held to be obiter, and the general conclusion reached by that case does not aid plaintiff: And see *Bender v. Stewart*, 75 Ind. 88.

It may well be, on the one hand, that particular circumstances, as an actual agreement between the parties concerning the payment of taxes (*Holterhoff v. Mead*, 36 Minn. 42, 29 N. W. 675), may serve to emphasize the relation of trust and confidence normally subsisting between cotenants, and that, on the other hand, different circumstances may diminish or remove their reciprocal obligations with respect to the payment of taxes and the assertion of adverse tax titles. Most of the cases cited by plaintiff, which more or less directly tend to support his views, are of the latter category and are easily distinguishable from the one at bar. Thus in *Boynton v. Veldman*, 131 Mich. 555, 91 N. W. 1022, the complainant claimed under a deed purporting to convey title to the entire interest, although in fact it made him a cotenant with another. The complainant requested his cotenant to aid in procuring certain tax titles not in any manner founded on his default, because the taxes had been levied, the <sup>195</sup> land sold, and the time of redemption had expired before the complainant owned any interest in the land. The cotenant never did so. The complainant bought the tax title. His cotenant never offered to, nor indicated his desire to, pay part of the taxes or to have the purchase inure to his benefit. Complainant's vendee under a contract of sale occupied the premises for five years without interference from the cotenant. In a suit to foreclose the land contract, it was held that the complainant's purchase of the tax title did not inure to his cotenant's benefit, and hence that the defense of complainant's inability to give a marketable title was without merit. It is evident that the normal relation of such trust and confidence involved in the case at bar did not exist in the Michigan case. Nor did the Michigan case involve a controversy in which one cotenant asserted the inhibition against his cotenant of the purchase of a mere tax lien which might have been paid or redeemed before the tax title came into existence.

In the case at bar the tax titles through which the plaintiff claims were liens only at the time plaintiff purchased the fee

title, and were purchased and perfected by him after he became a cotenant. In each instance the claim of the state would have been satisfied, and no tax title would have accrued, except for the affirmative action taken by the plaintiff to eliminate the right of redemption from the tax certificates. That Michigan case is therefore not inconsistent with the defenses here interposed, nor with the general Michigan rule, which, as a whole, tends to sustain the general inhibition: See *Dubois v. Campau*, 24 Mich. 360; *Richards v. Richards*, 75 Mich. 408, 42 N. W. 954. So *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497, also cited by plaintiff, recognizes that the purchase of an outstanding adverse title by a cotenant is not void, but may avail, unless the cotenant elects, within a reasonable time, to contribute proportionately to money expended in its purchase. The Arkansas cases, as a whole, adhere to the general rule, and do not sustain the plaintiff's contention in this case: *Moore v. Woodall*, 40 Ark. 42; *Burgett v. Williford*, 56 Ark. 187, 35 Am. St. Rep. 96, 19 S. W. 750. Other cases within the exception from the general rule of inhibition arise where the land has been assessed upon the tax books to and in the name of owners of undivided interests respectively, and when the owner of each undivided interest could have paid his own tax unaffected by the fact of joint interest, and where the subsequent <sup>196</sup> tax sale and deed were based upon this separate and individual assessment, as *Bennet v. North Colorado Springs etc. Co.*, 23 Colo. 470, 58 Am. St. Rep. 281, 48 Pac. 812.

Counsel for plaintiff accordingly argues that, under section 1604 of the General Statutes of 1894, any estate or interest can be protected by making a proper application to be allowed to redeem. That section reads as follows: "Any person who has, or claims an interest in or lien upon any piece or parcel of land sold, may redeem such estate or interest by paying into the treasury a proportionate part of the amount required to redeem the whole": See *Blackwood v. Van Vleit*, 30 Mich. 118. It is not clear why the right to redeem an undivided interest destroys the general prohibition against the acquisition of a tax title by one cotenant adversely to another. Its purpose is merely to enable one cotenant to protect himself. It suggests no reason for construing that statute so as to justify one owner in destroying the title of the other.



Moreover, in this case the plaintiff seems to have failed to bring his case within the adjudged interpretation of that statute. If by any construction, under like circumstances, he is allowed to acquire a tax title against his cotenant, it must be upon the undivided interest which bears the record "earmarks" of ownership by that cotenant: *Wray v. Litchfield*, 64 Minn. 309, 67 N. W. 72.

Our attention has not been called to the presence in this record of any evidence to that effect, nor have we been able to discover it. On the contrary, notices to eliminate the right of redemption, under the law required to be addressed to the person in whose name the premises were assessed at their date, were addressed, one at least to Lightbody and McCall, and others to plaintiff himself, H. H. Hoyt. It is true that the court found that the plaintiff had paid the taxes due "upon his undivided one-half of said lands," and that his tax certificates were upon the undivided half "belonging to defendant." This is not equivalent to a finding that the plaintiff paid taxes upon or acquired tax certificates to the undivided half of said lands appearing upon the records to have been assessed in his name, or that they bore the record "earmarks" of his particular ownership. To so construe the finding would be to partially contradict and to exceed the record. The words of ownership <sup>197</sup> were used in the finding in a general colloquial, rather than in a strict, special, technical, and restricted, sense. The finding is too vague and indefinite to serve plaintiff's purposes. Evidently it was general. There is, moreover, no assertion of claim, no specific finding, and no proof that the interest of each cotenant was separately assessed as appeared in *Bennet v. North Colorado Springs etc. Co.*, 23 Colo. 470, 58 Am. St. Rep. 281, 48 Pac. 812. An assessment of taxes may be legally, and in practice constantly is, made to cotenants jointly; nor will it be vacated because one of two cotenants in common is named as the owner: *Black on Tax Titles*, 2d ed., 131, sec. 106.

Even if, however, the finding be construed most favorably to the plaintiff, it serves to illustrate the unreasonableness of the rule for which he insists and the impossibility of its present application: See *Black on Tax Titles*, 352, sec. 282. According to that rule, if a cotenant has paid taxes on a half not bearing the "earmarks" of his particular ownership, he,

having paid them voluntarily and without obligation so to do, has lost his money. If he had paid taxes on a half bearing his own "earmarks," he thereby discharged the obligation of his own land to the state, and has no remedy, and can base no adverse title upon the performance of his own duty. So, also, according to plaintiff's theory, if a cotenant has acquired a tax title to an undivided interest not bearing the "earmarks" of his own ownership, he cannot assert that it affected his cotenant's title more or less than his own; and if he has acquired a tax title on an undivided interest bearing the "earmarks" of his particular ownership, he may have strengthened his own title, but he has not prejudicially affected that of his cotenant. In this case, plaintiff on his own theory seems to have perfected a tax title to land assessed in the name of the former cotenants (Lightbody and McCall), which is of no avail to him for present purposes, because it does not bear the earmarks of his particular ownership and to have perfected other tax titles to an interest assessed in his own name, which are of no avail to him here because they serve merely to strengthen his record title.

2. Other assignments of error present the question whether the record shows sufficient proof by the defendants of their heirship to John Lightbody, who was the owner of the undivided interest in the land, and that he was dead. The court found this to be a fact. The evidence justified this finding. A witness, whose wife and the wife <sup>198</sup> of deceased were half sisters and who knew the family well, with whom one of the children lived for two years, and who knew the grandmother, and with whose family the dead husband and wife had exchanged visits, who talked to both of them about their children, and who was so well acquainted with the family that, if there had been any more heirs, he would have known of it, was the only witness on this subject. He testified to the relationship of husband and wife between John and Kate Lightbody; that the defendants were the heirs, and the only heirs, of the deceased; that the names of such heirs were as appear in this record; and that both husband and wife were dead, as found by the trial court. The evidence of a witness whose knowledge with reference to the subject was derived from an intimate acquaintance with the family is admissible as to such facts of family history as marriage, kinship, name, and death: See *Backdahl v. Grand Lodge A. O. U. W.*, 46 Minn.

61, 48 N. W. 454; 1 Greenleaf on Evidence, sec. 114 et seq.; Abbott on Trial Evidence, 2d ed., 121, sec. 39.

These conclusions render it unnecessary to consider the validity of plaintiff's tax titles and other questions raised in the briefs.

Order affirmed.

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## RIGHT OF A COTENANT TO ACQUIRE AND ENFORCE TAX TITLES.

### I. General Rule Denying the Right.

- a. Statement of Rule, 367.
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### II. Circumstances Affecting the Right.

- a. Time of Accrual of Tax and of Acquisition of Title, 369.
- b. Possession of the Property by Cotenants, 369.
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### III. Application of Rule to Various Persons.

- a. Different Kinds of Cotenants, 371.
- b. Cotenants of Estate in Remainder, 371.
- c. Husband of Cotenant, 371.
- d. Grantee of Cotenant, 372.

### IV. Right of Purchasing Tenant to Contribution, 372.

#### I. General Rule Denying the Right.

a. **Statement of Rule.**—The authorities are uniform in affirming the general rule that a cotenant who acquires a tax title to the common property, either by purchasing at the tax sale himself or subsequently buying from a purchaser who bought at such sale, cannot assert such title against his co-owners, except as a basis for contribution to repay him for his expenditure. His purchase simply amounts to a payment of the taxes, or a redemption from the sale, and gives him no right except to compel contribution. He derives no exclusive benefit from the purchase. It inures to the benefit of all the cotenants, if they elect to avail themselves thereof by reimbursing him: *Donnor v. Quatermas*, 90 Ala. 164, 24 Am. St. Rep. 778, 8 South. 715; *Morange v. Doe*, 143 Ala. 459, 111 Am. St. Rep. 52, 39 South. 161; *Cocks v. Simmons*, 55 Ark. 104, 29 Am. St. Rep. 28, 17 S. W. 594; *Mills v. Tukey*, 22 Cal. 373, 83 Am. Dec. 74; *Emerie v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Williams v. Clyatt* (Fla.), 43 South. 441; *Brown v. Hogle*, 30 Ill. 119; *Bracken v. Cooper*, 80 Ill. 221; *Lomax v. Gindele*, 117 Ill. 527, 7 N. E. 483; *Bender v. Stewart*, 75 Ind. 88; *English v. Powell*, 119 Ind. 93, 23 N. E. 458; *Flinn v. McKinley*, 44 Iowa, 68; *Shecan v. Shaw*, 47 Iowa, 411; *Shell v. Walker*, 54 Iowa, 386, 6 N. W. 581; *Clark v. Brown*, 70 Iowa, 139, 30 N. W. 46; *Funson v. Bradt*, 105 Iowa, 471, 75 N. W. 337; *Blumenthal v. Culver*, 116 Iowa, 326, 89 N. W. 1116; *Dubois v. Campau*, 2 Mich. 360; *Defreese v. Lake*, 109 Mich. 415, 63 Am. St. Rep. 584, 67 N. W. 505, 32 L. R. A. 744; *Sleight v. Roe*, 125 Mich. 585, 85 N. W.

10; *Dahlem v. Abbott*, 146 Mich. 605, 110 N. W. 47; *Holterhoff v. Mead*, 36 Minn. 42, 29 N. W. 675; *Falkner v. Thurmond* (Miss.), 23 South. 584; *Lloyd v. Lynch*, 28 Pa. 419, 70 Am. Dec. 137; *Davis v. King*, 87 Pa. 261; *Tanney v. Tanney*, 159 Pa. 277, 39 Am. St. Rep. 678, 28 Atl. 287; *Johnson v. Branch*, 9 S. Dak. 116, 62 Am. St. Rep. 857, 68 N. W. 173; *Downer's Admr. v. Smith*, 38 Vt. 464; *Bottin v. Woods*, 27 W. Va. 58; *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; *Hannig v. Mueller*, 82 Wis. 235, 52 N. W. 98; *Davis v. Chapman*, 24 Fed. 674. Some of the courts speak of him as holding the title in trust for the benefit of the owners in common until they refuse to make contribution: *Johns v. Johns*, 93 Ala. 239, 9 South. 419; *Fallon v. Chidester*, 46 Iowa, 588, 26 Am. Rep. 164; *Weare v. Van Meter*, 42 Iowa, 128, 20 Am. Rep. 616; *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269. The tax title inures to the benefit of all, notwithstanding the purchaser had agreed with a stranger that the bid should be for his benefit to the extent of one-half the property: *Fields v. Farmers' etc. Bank*, 110 Ky. 257, 61 S. W. 258. But in any case cotenants who wish to avail themselves of the benefit must ordinarily elect to do so within a reasonable time: *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216.

An exception to this general rule is said to arise where the land has been assessed upon the tax-books to and in the names of owners of undivided interests respectively, and when the owner of each undivided interest could have paid his own tax unaffected by the fact of joint interest, and where the subsequent sale and deed are based upon this separate and individual assessment: See the principal case, ante, p. 358; *Bennett v. North Colorado etc. Imp. Co.*, 23 Colo. 470, 58 Am. St. Rep. 281, 48 Pac. 812.

b. **Reasons for Rule.**—The rule inhibiting the assertion of an adverse tax title by one cotenant against another is said to be based upon a community of interest in a common title between persons having a common possession and a common interest in the safety of the possession of each, whereby such a relation of trust and confidence is created between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other in reference to tax titles to the property so situated: See the principal case; *Venable v. Beauchamp*, 33 Ky. (3 Dana) 321, 28 Am. Dec. 74; *Forrer v. Forrer's Exrs.*, 29 Gratt. 144; *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; *Rothwell v. Dewees*, 67 U. S. 613, 17 L. ed. 309. In the recent case of *Stoll v. Griffith*, 41 Wash. 37, 82 Pac. 1025, it is said that "some courts base the rule upon the confidential relation existing between the cotenants; others upon the ground that the obligation to pay taxes on the common property rests equally upon all the cotenants, and that it would be inequitable to permit one or any number of them to take advantage of his or their own default and acquire the title of their cotenant at a tax sale. The courts which adopt the latter view hold generally that one cotenant may acquire title to the

common property as against his cotenant, where the property is sold for a tax which accrued before he acquired an interest in the common property, and which he was not obligated to pay: *Oswald v. Wolf*, 129 Ill. 200, 21 N. E. 839; *Sands v. Davis*, 40 Mich. 14; *Allen v. Dayton Hotel Co.*, 95 Tenn. 480, 32 S. W. 962; *Lybrand v. Haney*, 31 Wis. 230." The above case of *Sands v. Davis* is approved in *Olmstead v. Tracy*, 145 Mich. 299, ante, p. 299, 108 N. W. 649.

## II. Circumstances Affecting the Right.

a. **Time of Accrual of Tax and of Acquisition of Title.**—But while, as has just been seen, some authorities have thought one cotenant may acquire title to the common property as against his co-owners, where the property is sold for a tax which accrued before he acquired an interest in the common property, the Minnesota court affirms in the principal case that one who, after his purchase of an undivided interest in land, buys tax certificates thereto, based on taxes assessed in all cases, and sales made in all cases but one, prior to the transfer to him of the undivided interest, and who perfects these tax certificates by elimination of the right of redemption, is not permitted in law to assert the resulting tax titles adversely to his cotenants. And the Iowa court has decided that a tax deed acquired by a tenant in common is not sufficient in equity to divest the interest of a cotenant, notwithstanding the holder of the deed may have acquired the tax certificate before he became tenant in common: *Flinn v. McKinley*, 44 Iowa, 68; *Tice v. Derby*, 59 Iowa, 312, 13 N. W. 301; *Smith v. Smith*, 68 Iowa, 608, 27 N. W. 780.

In *Maul v. Rider*, 51 Pa. 377, while two persons were joint owners of the equitable title to a tract of land, taxes were assessed upon the whole; after partition the entire tract was sold for these taxes, and the purchaser assigned his deed to one of the cotenants. It was held that this was a redemption by that cotenant of his own parcel, and necessarily of the parcel of his cotenant, but vested in him no title to his cotenant's part.

In Pennsylvania, the rule appears to obtain that when land has been sold for taxes to a stranger, and the time for redemption has expired, any previously existing cotenancy is determined, and any of the former cotenants may purchase the tax title and assert it against his cotenants: *Lewis v. Robinson*, 10 Watts, 354; *Kirkpatrick v. Mathiot*, 4 Watts & S. 251; *Reinboth v. Zerbe Run. Imp. Co.*, 29 Pa. 139. This doctrine, however, seems to have met with little approval elsewhere: *Allen v. Allen*, 114 Wis. 615, 91 N. W. 218; notes to *Cone v. Wood*, 75 Am. St. Rep. 239; *Venable v. Beauchamp*, 28 Am. Dec. 85.

b. **Possession of the Property by Cotenants.**—Some authorities state that where cotenants are in actual possession, neither can, as against the fellow-tenants, acquire and enforce a tax title, or that a cotenant in possession cannot acquire a tax title to the prejudice of his co-

owner, clearly intimating that possession or unity of possession may be a material circumstance: *Goralski v. Kostuski*, 179 Ill. 177, 70 Am. St. Rep. 98, 53 N. E. 720; *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334, 34 N. E. 813, 36 N. E. 211; *Alexander v. Sully*, 50 Iowa, 192; *Broquet v. Warner*, 43 Kan. 48, 19 Am. St. Rep. 124, 22 Pac. 1004; *Minler v. Durham*, 13 Or. 470, 11 Pac. 231. Other authorities affirm that a cotenant, without reference to the question of possession, cannot acquire and assert a tax title against his cotenants: *Butler v. Porter*, 13 Mich. 292; *Dubois v. Campan*, 24 Mich. 360; *Cohea v. Hemingway*, 71 Miss. 22, 42 Am. St. Rep. 449, 14 South. 734.

The materiality of possession depends in some measure, it would seem, on the character of the tenancy, that is, whether the co-owners are tenants in common, or whether they are joint tenants, tenants by entirety, or coparceners. "In case of cotenants whose rights arise under the same instrument or act of law, such as coparceners, devisees, tenants by entirety, or joint tenants, the union of title and interest is so close, and the relation of the parties so intimate, that from these facts alone a relation of trust and confidence is considered to exist, forbidding the acquisition of an outstanding title by one adverse to his cotenants, regardless of the question of possession. If, in the last-named case, the cotenant who purchases the adverse tax title be in fact in possession, it simply adds another reason for the rule of disability": *Allen v. Allen*, 114 Wis. 615, 91 N. W. 218.

Tenants in common, however, may claim under separate conveyances and through different grantors; their only unity is that of right to the possession of the common property. If, therefore, this unity is broken, it might well be that a tenant out of possession would have the right to acquire a tax title. But it is clear, on the other hand, that one tenant in common, in the sole or joint possession of lands, cannot acquire a tax title issued for taxes accruing during his possession, and assert it to cut off his cotenants, whether the cotenancy exists under the same or different instruments. It is his duty to pay the taxes, and he cannot take advantage of his own dereliction of duty: *Allen v. Allen*, 114 Wis. 615, 91 Nev. 218.

**c. Holding of Title Under Different Instruments.**—A number of other courts have also commented on the exception to the general rule, where cotenants have acquired their respective titles by different instruments at different times. Said the supreme court of Michigan: "While it is undoubtedly the general rule that one tenant in common cannot acquire an outstanding title adverse to his cotenant, and that the purchase of such a title inures to the benefit of all the cotenants upon equitable contribution being made, there are well-defined and well-established exceptions to the general rule, as where the cotenants have acquired their respective titles by different instruments and at different times, and no relationship of trust or

confidence exists between them, and also where the outstanding title has not been created or suffered to arise through the default of the purchasing cotenant": *Boynton v. Veldman*, 131 Mich. 555, 91 N. W. 1022.

In *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216, Justice Brannon expresses the opinion that, as an original proposition, this exception is correct, and is supported by *Elston v. Piggott*, 94 Ind. 14; *King v. Rowan*, 10 Heisk. 675; *Frentz v. Klotsch*, 28 Wis. 312; but he adds that the general rule that one tenant in common, joint tenant, or coparcener cannot acquire a tax title to the prejudice of his fellow-tenants has so long been stated in a general way that the exception can hardly be said to be tenable; and cites *Bracken v. Cooper*, 80 Ill. 221, and *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422, 41 N. E. 931, as denying the exception.

### III. Application of Rule to Various Persons.

a. **Different Kinds of Cotenants.**—The general rule that one cotenant cannot acquire a tax title to the common property and enforce it against his cotenants applies to all persons having a common title and interest, whether they are joint tenants, tenants by entirety, coparceners, or tenants in common. However, it is worthy of notice that since joint tenants, tenants by the entirety, and coparceners always hold under the same title, their unity of interest is so intimate and complete that there can hardly be any exceptions to the rule, in its application to them. But tenants in common may claim under separate conveyances from different grantors thus having only a unity of right to possession. Therefore, the rule may not be without exceptions in its application to them, especially when their actual possession is not joint: *Forrer v. Forrer*, 29 Gratt. 144; *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; *Allen v. Allen*, 114 Wis. 615, 91 N. W. 218.

b. **Cotenants of Estate in Remainder.**—One tenant in common of a remainder cannot, by purchasing the land at a tax sale, cut off the rights of his co-owners and acquire the exclusive title to himself. The purchase will inure to the benefit of all the cotenants. He becomes entitled, however, to contribution from his fellow-tenants: *Johns v. Johns*, 93 Ala. 239, 9 South. 419; *Harrison v. Harrison*, 56 Miss. 174. This rule has been applied where the person seised of lands as a tenant in dower neglects to pay the taxes thereon so long that they are sold therefor, and one of the several tenants in common of the remainder in fee purchases at the sale: *Fox v. Coon*, 64 Miss. 465, 1 South. 629; *Clark v. Lindsey*, 47 Ohio St. 437, 25 N. E. 422, 9 L. ed. 740.

c. **The Husband of a Cotenant** cannot acquire a tax title to the common property which he can assert to the prejudice of her co-owners. He is regarded as having purchased for the benefit of all the cotenants: *Busch v. Huston*, 75 Ill. 343; *Burns v. Byrne*, 45 Iowa,

285; *Lee v. Fox*, 36 Ky. (6 Dana) 171; *Alexander v. Light*, 112 La. 925, 36 South. 806; *Robinson v. Lewis*, 68 Miss. 69, 24 Am. St. Rep. 254, 8 South. 258, 10 L. R. A. 101; *Rothwell v. Dewees*, 67 U. S. 613, 17 L. ed. 309. But see *Broquet v. Warner*, 43 Kan. 48, 19 Am. St. Rep. 124, 22 Pac. 1004. He may, however, hold the deed as evidence or security for the money paid: *Chace v. Durfee*, 16 R. L. 248, 14 Atl. 919.

**d. Grantee of Cotenant.**—Where a cotenant has acquired a tax title which he cannot enforce as against his co-owners because of his relationship with them, his grantee will ordinarily stand in no better position: *Conn v. Conn*, 58 Iowa, 747, 13 N. W. 51; *Richards v. Richards*, 75 Mich. 408, 42 N. W. 954; *Jonas v. Flanniken*, 69 Miss. 577, 11 South. 319; *Clark v. Rainey*, 72 Miss. 151, 16 South. 499. But the rule that the grantee of a tenant in common who purchased at a tax sale cannot set up the tax title as against another co-owner does not apply where the grantor acquired the tax title first and subsequently purchased the interest of a cotenant in the land, since the owner of a tax title may supplement it by such a purchase, and still rely on it: *Jonas v. Flanniken*, 69 Miss. 577, 11 South. 319.

#### IV. Right of Purchasing Cotenant to Contribution.

The general rule, as has already been stated, is that the purchase of a tax title to the common property by one cotenant inures to the benefit of all the co-owners, and the only right acquired by him as against his fellow-tenants is the right to demand a pro rata contribution from them to reimburse him for his expenditure made to relieve the common property from a common burden. This right to enforce contribution according to their respective shares he does acquire: *Johns v. Johns*, 93 Ala. 239, 9 South. 419; *Burgett v. Tallierro*, 118 Ill. 503, 9 N. E. 334; *Phillips v. Wilmarth*, 98 Iowa, 32, 66 N. W. 1053; *Hake v. Lee*, 106 La. 482, 31 South. 54; *Page v. Weaver*, 8 Mich. 263, 77 Am. Dec. 446; *Barber v. Jones*, 62 N. H. 54, 13 Am. St. Rep. 586; *Clark v. Lindsey*, 47 Ohio St. 437, 25 N. E. 422, 9 L. R. A. 740. The amount which he has paid may be regarded as a lien or charge on the property for the purpose of enforcing his right to contribution: *Moore v. Woodall*, 40 Ark. 42; *Muttsbaugh v. Burke*, 33 Kan. 260, 6 Pac. 252; *Delashmut v. Parratt*, 39 Kan. 548, 18 Pac. 712; *Allen v. Poole*, 54 Miss. 323; *Harrison v. Harrison*, 56 Miss. 174. He may hold his tax deed as evidence or security for the money paid: *Chace v. Durfee*, 16 R. L. 248, 14 Atl. 919.



## KOSCHMAN v. ASH.

[98 Minn. 312, 108 N. W. 514.]

**MASTER AND SERVANT—Inspection of Tools.**—An employer is under no duty to inspect simple or common tools, or to discover or remedy defects arising necessarily from the ordinary use of such instruments. This rule applies to an ordinary sledge or hammer, purchased by the employer from a wholesale hardware dealer, and delivered to the employé in good condition. (pp. 375, 376.)

Miller & Clapp, for the appellant.

John Jenswold, for the respondents.

**312 ELLIOTT, J.** The plaintiff, Koschman, was injured while in the employ of the defendant, Ash, and recovered a verdict in the court below. The appeal is from an order of the trial court denying the defendant's motion for judgment notwithstanding the verdict or for a new trial.

In 1903 Ash was operating a sawmill in Virginia, Minnesota. **313** Koschman was, and for some months had been, in his employ as a blacksmith, working in a shop operated in connection with the mill. At the time of the accident, July 17, 1903, Koschman was engaged with another employé by the name of Olson in cutting bolts from a rod of iron. Koschman placed the bolt on a beveled-edged instrument which rested upon an anvil and held a cold chisel on the upper edge of the bolt. Olson then struck the chisel with a sledge or hammer. After two or three strokes the bolt was cut almost through. Koschman then laid the end of the bolt across the anvil and Olson gave the tip end a light tap with the hammer. When this was done, a piece of steel flew from the end of the hammer and penetrated Koschman's eye. The complaint alleged: "That defendant did carelessly and negligently fail and omit to furnish for plaintiff's use a suitable and proper hammer to do such work, and in like manner did carelessly and negligently furnish the aforesaid hammer so used for the said use, which hammer was defective and not reasonably safe for use, and though of steel its face or head had not been properly, equally and evenly tempered, and the same was not smooth, but had, for a long time prior thereto, been subject to hard usage, and had been worn away, battered, and made unsafe for further use, and become indented and was full of thin splinters, chips, scales, or fragments which were loose,

and pieces of steel therein were liable at any time, by a blow of said hammer, to be broken off and to fly therefrom and endanger persons who were present and engaged in and about its use."

It further alleged that for a period of more than four weeks prior to the time when the plaintiff was injured, the hammer had been in an unsafe and dangerous condition, of which fact the defendant had full notice and knowledge, but nevertheless did carelessly and negligently furnish the same and require the plaintiff and his assistant to use the same in their work. The plaintiff's case rests upon the alleged truth of these allegations.

The defendant makes numerous assignments of error, but in view of our conclusion upon the question of the defendant's negligence, it is only necessary to consider one. The sledge or hammer was purchased <sup>314</sup> in the open market from a wholesale hardware dealer, and when furnished to Koschman it was new and in good condition. It is admitted that Ash cannot be charged with negligence in originally furnishing Koschman with a defective tool, but it is contended that it was his duty, not only to furnish to the employé a reasonably safe instrument with which to work, but after having done this, to inspect the same while it was being used by the employé and remedy any defects which might be found to exist. The jury were instructed that if the defendant "[was] chargeable with negligence at all, it must be because he kept it in use without repairing, after it became in an unsafe condition for its intended use, knowing it to be in such condition or charged with such knowledge."

When the appliances or machinery furnished employés are at all complicated in character or construction, the employer is charged with the duty of making such reasonable inspection as is necessary to detect defects. But the master is under no duty to inspect simple or common tools, or to discover or remedy defects arising necessarily from the ordinary use of such instruments: *Miller v. Erie R. Co.*, 21 App. Div. 45, 47 N. Y. Supp. 285 (a push-pole by which an engine on one track was able to move a car on an adjoining track); *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56 (a ladder); *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. 339 (a ladder); *Webster Mfg. Co. v. Nisbett*, 205 Ill. 273, 68 N. E. 936 (a hammer); *Meador v. Lake Shore & M. S. Ry. Co.*, 138 Ind. 290, 46 Am.

St. Rep. 384, 37 N. E. 721 (a ladder); Wachsmuth v. Shaw C. C. Co., 118 Mich. 275, 76 N. W. 497 (a snaphammer); Dompier v. Lewis, 131 Mich. 144, 91 N. W. 152 (a hammer); O'Brien v. Missouri etc. Ry. Co., 36 Tex. Civ. App. 528, 82 S. W. 319 (a wrench); Gulf etc. R. Co. v. Larkin, 98 Tex. 225, 82 S. W. 1026, 1 L. R. A., N. S., 944 (a defective globe on a lantern); Lynn v. Glucose S. Co., 128 Iowa, 501, 104 N. W. 577 (a hammer of soft steel with which to break lumps of coal); Garragan v. Fall River Iron Works Co., 158 Mass. 596, 33 N. E. 652; Martin v. Highland Park Mfg. Co., 128 N. C. 264, 83 Am. St. Rep. 671, 38 S. E. 876; Georgia Pac. Ry. Co. v. Brooks, 84 Ala. 138, 4 South. 289; Georgia R. & B. Co. v. Nelms, 83 Ga. 70, 20 Am. St. Rep. 308, 9 S. E. 1049; Jenney E. L. & P. Co. v. Murphy, 115 Ind. 566, 18 N. E. 30; Labatt on Master and Servant, sec. 154.

<sup>315</sup> In *Stork v. Charles Stolper Cooperage Co.*, 127 Wis. 318, 106 N. W. 841, it was held that, under the circumstances there disclosed, the duty of inspections extended to a small tool known as a monkey-wrench. But the court said: "It may be conceded that, generally speaking, a monkey-wrench is in such category, and the rule of law is well established in this state and elsewhere that, in case of such simple tools, no liability rests on the master for the ordinary perils resulting from their use, nor for those latent and usual defects or weaknesses which, by reason of the common, usual character of the appliance, are presumed to be known to all men alike. This exemption from liability is, we believe, in all cases, based upon the condition that the defect and peril are such that no superiority of knowledge in the master over the employé exists or can be presumed." The liability in that case was rested upon the exception to the general rule said to exist when the defect is known to the master and neither known to the employé, nor of such a character as to be obvious to that observation which may be expected to accompany its use.

The present case does not fall within such exception. The instrument was a common, ordinary sledge or hammer, weighing eight pounds and having a handle about three feet long. It was of the type in common use by unskilled laborers for a variety of purposes such as breaking stone and driving stakes. It was one of the simplest and commonest tools in use. It was a general utility instrument, often used for general purposes about the premises when not in use in the blacksmith-shop.

It was a sledge such as is "generally used in a blacksmith-shop." It was a double headed or faced two-handed sledge, about as simple in construction and as easy to understand as a club. It was made of steel, but was not evenly tempered. It was not what is known as a "flogging" hammer. It does not appear that it was originally unsuitable for the work for which it was being used. When the plaintiff began to use the sledge it was new and in good condition, but by the time of the accident it had become somewhat battered and one end chipped off. Plaintiff says that for some four weeks before the accident so many chips were breaking off the hammer that it became in a dangerous condition, and he remarked to his fellow-workman that it was very poor and that he could not hit well with it. He <sup>316</sup> also observed that chips were breaking and flying off. He did not, however, complain of the condition of the hammer to Ash or to the foreman of the mill. There were other long and short handled hammers of lighter weight about the premises, but it appears that this was the only sledge at hand, and Olson picked it up to use in the work of cutting the bolts because it was handy. It is thus apparent that the sledge was a tool of the commonest character, and that the plaintiff had full and complete knowledge of its condition during all the time it was in use. The employer never assumed to inspect the tool.

In *Vant Hul v. Great Northern Ry. Co.*, 90 Minn. 329, 96 N. W. 789, the defendant not only manufactured the hammers, but kept them in a room fenced off for the purpose, and provided a tool inspector whose duty it was, on the application of the workman, to hand out the tool for the particular purpose. The hammer there under consideration was a "flogging hammer," and the court said: "The hammer in question was manufactured by appellant. Such hammers were made from bars of steel, and it required experience and great skill to properly temper them, and very few will stand continual use without, in the course of time, showing cracks or checks upon their surface and edges, which appear sooner or later according to the temper of the steel and the manner and length of time of use, and that, as a result of such checks and cracks, there comes a time in the life of such hammers when they are liable to break and must be set aside as useless. . . . When we consider the skill required in the manufacture of such hammers, and the fact that there arrives a point in the

course of their use when their vitality is destroyed and they are liable to check and break, a condition is presented which takes them out of the class known as common tools whose condition is as easily discernible by a workman as an inspector."

The tool which caused the injury under consideration in *Morris v. Eastern Ry. Co.*, 88 Minn. 112, 92 N. W. 535, was also a flogging hammer—"a tool which we must assume is somewhat different from an ordinary hammer," and the injury "was not caused by, or the result of, use or wear, but, according to the allegations of the complaint, a defect in making—the manufacturer being the defendant itself."

As the defendant was under no obligation to inspect the sledge after it was delivered to the plaintiff in good condition, the motion for judgment <sup>317</sup> in favor of the defendant notwithstanding the verdict should have been granted.

Order reversed, with directions to the district court to grant the defendant's motion for judgment notwithstanding the verdict.

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*The Duty of an Employer to Inspect* common and ordinary tools intended for the use of his employes is considered in the note to *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 298. It has been affirmed that a master is not liable for an injury to his servant due to imperfections in small and common tools in every-day use, such as hammers: *Martin v. Highland Park Mfg. Co.*, 128 N. C. 264, 83 Am. St. Rep. 671.

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## OAKLAND CEMETERY ASSOCIATION v. COUNTY OF RAMSEY.

[98 Minn. 404, 108 N. W. 857, 109 N. W. 237.]

**TAXES.**—To Warrant a Recovery of Taxes Paid Under Protest, the element of coercion must be found. In the absence of actual, present and potential compulsion, payment under protest is not sufficient. (p. 379.)

**TAXES—Compulsory Payment in Order to Record Deed.**—One who by force of a statute is unable to place on record a deed by which he has acquired title to land, by reason of illegal taxes charged upon the property, may pay them in order to secure the recording of his deed, without the payment being deemed voluntary. In such a case, if he pays the taxes under protest, he may recover them in a subsequent action. (p. 379.)

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**TAX SALES.**—A Purchaser of a Tax Title may be required to protect his interest, not only as against all subsequent taxes, but also against anterior ones. (p. 384.)

**TAX SALES—Priority of Titles.**—A Tax Title based on a sale under a later tax may prevail over a later tax sale on an earlier tax lien. (p. 384.)

William G. White, for the appellant.

Thomas R. Kane and O. H. O'Neill, for the respondent.

**405 JAGGARD, J.** This was an action brought by the plaintiff and appellant against the defendant and respondent to recover certain taxes alleged to have been paid under duress. The court found for the defendant. Plaintiff appealed from an order denying a new trial.

The trial court, in a carefully prepared memorandum, states the facts and the principal issues argued before it, and presented by this appeal, as follows: "Taxes for the year 1896 were duly levied against this property, and in default of payment judgment was duly rendered and the premises sold thereunder and bid in by the state in May, 1898. There being no bidders at the sale, and there being no redemption therefrom, the rights of the state therein were, in November, 1899, duly assigned to the National Bond and Security Company, plaintiff's grantors, which prior thereto had no interest in said premises. The National Bond and Security Company duly perfected title to these premises under such sale and assignment certificate by causing proper notices of the expiration of the time of redemption to be given, and, no redemption having been made, thus acquired the fee title. Prior to the sale of said premises for the taxes of 1896, taxes for the year 1892 had been duly levied and assessed, and judgment therefor was entered in this court in May, 1894, which judgment is void because the county commissioners never properly designated a newspaper in which to publish the delinquent list for that year. At the time of making the list for delinquent taxes for the year 1898—that is, in January, 1900—the auditor, pursuant to chapter 322, page 410, Laws of 1899, duly appended thereto and included therein the taxes upon said premises for the year 1892, as provided by law, and at the sale under judgment therefor, there being no other bidders, the land was bid in by the state in its name in May, 1900, and, no redemption having been made, the state is still the owner of the interest thus acquired."

1. The preliminary question upon this appeal is the correctness of defendant's argument for not sustaining this appeal, namely: The following necessary facts did not appear, to wit: That the payment of taxes in question was involuntary and made under such circumstances <sup>408</sup> as to constitute duress, and that the taxes were unjust and illegal. It insisted that the property rights of plaintiff were never in jeopardy, because, as the court finds, the plaintiff reserved from the consideration price to be paid his grantor enough to pay the taxes under protest and agreed to account for such sum to his grantor in case of recovery in this action. We think the agreement between the plaintiff and his grantor was immaterial to the present issue. If the plaintiff was entitled to recover, what it might do with the money recovered is no concern of public authorities. The agreement between the plaintiff and his grantor was a private one. Neither that agreement nor what might be done under it affected the right of the plaintiff to record his deed.

It is undoubted, as the defendant contends, that to warrant a recovery for taxes paid under protest, the element of coercion must be found, and that, in the absence of actual, present and potential compulsion payment under protest is not sufficient. But "the difficulty lies in determining whether in any particular case the payment is to be deemed as compulsory or voluntary. . . . It may be stated as a general proposition that a payment under compulsion of money unlawfully demanded does not conclude the party paying, he by proper protest indicating that he pays by compulsion, and not voluntarily. He may recover it again": Dickinson, J., in *State v. Nelson*, 41 Minn. 25, 42 N. W. 548, 4 L. R. A. 300. It was distinctly held in that case that one who by force of the statute is unable to place on record a deed of conveyance by which he has acquired title to real estate, by reason of illegal taxes being charged upon the land, may pay such taxes in order to secure the recording of his deed, without such payment being deemed voluntary. Therefore there was duress in this case. The last case cited disposes also of defendant's further contention that there could be no recovery unless the taxes were illegal. The general rule is that one paying under duress and with protest "money unlawfully demanded" may recover it again.

2. A further contention of the defendant, which was that to entitle the plaintiff to recover, it must also appear that the plaintiff or its grantor pursued the ordinary remedies provided by the statute to be relieved from the payment of the so-called illegal tax, is without merit. *Falvey v. Board of Co. Commrs. of Hennepin County*, 76 Minn. 257, 79 N. W. 302, which he cites, does not support his proposition in this <sup>407</sup> case. There the tax alleged to have been paid under duress, and which was paid under protest, was not yet delinquent. No proceedings to enforce its collection had been commenced. Much less had any judgment been rendered against the land. The court refused to permit the party seeking to recover to ignore the remedy given by statute to defend against illegal taxes paid with knowledge of all the facts and then to recover them by suit. There was, therefore, no compulsion or coercion, and the character of the payment was not affected by his protest. In the case at bar the taxes had been delinquent, proceedings to enforce their collection had been commenced, judgment had been rendered, and a sale had been made, when they were paid.

The objection of the defendant is not addressed to the failure of the plaintiff to resort to mandamus, nor does this point seem to have been raised in the court below. While that fact would not prevent the present consideration of the question, we are not inclined to decide it, because, *inter alia*, of the considerations referred to in *State v. Weld*, 66 Minn. 219, 68 N. W. 1068. That case involved a mandamus to compel the county auditor to indorse "Taxes paid and transfer entered" upon a deed. Judge Buck there said: "The auditor must act promptly in such matters, and ascertain, from the face and contents of the deed or instrument and from the books and records of his office, if there be delinquent taxes upon the land described therein, and make or refuse his notation accordingly. While the auditor is not a court to finally adjudicate upon the ownership or interests affecting real property described in a deed or instrument so presented to him, yet he must act upon the apparent right or interest therein appearing, and, having done this, he has presumptively performed his duty. We do not hold that, if the auditor should err in refusing to make notation in a proper case, the party would be without remedy."



3. The essential question on the merits is accordingly presented for consideration. That question is this: Was the purchaser of a tax certificate, under the revenue system provided for by chapter 11 of the General Statutes of 1878 and of the General Statutes of 1894, required to protect his interest thereunder as against taxes levied and assessed prior to the year in which the tax under the sale for which he claims title was levied and assessed? In other words, did a tax title based on <sup>408</sup> an earlier sale under a later tax lien prevail over a later tax sale on an earlier lien?

On the one hand, the arguments for holding that tax certificate based on a later lien confers an interest not affected by a later sale on an earlier lien are many and cogent. A tax title is generally regarded as a definite grant from the sovereignty which bars all other titles of record or otherwise and imports an absolute paramount title as against the world. It is generally accepted that a tax title is a new title, which takes its status, not from the date of the tax judgment sale, but from the date of the tax lien. This accords with the sound public policy of securing prompt receipt of public revenue by encouraging bidders at tax sales and of preventing the accumulation in the hands of the state of idle lands forfeited to it because of nonpayment of taxes. In *Jarvis v. Peck*, 19 Wis. 74, *Dickson, J.*, said: "Of course, a valid sale and conveyance under a junior assessment cut off all former (tax) titles or liens." To the same effect, see *Sayles v. Davis*, 22 Wis. 225; *Buckley's Lessees v. Osburn*, 8 Ohio, 180; *Emmons County v. Bennett*, 9 N. Dak. 131, 81 N. W. 22; *Wall v. District of Columbia*, 6 Mackey (D. C.), 194; *Robbins v. Barron*, 32 Mich. 36; *Meldahl v. Dobbin*, 8 N. Dak. 115, 77 N. W. 280; *Preston v. Van Gorder*, 31 Iowa, 250; *Bowman v. Thompson*, 36 Iowa, 505; *Irwin v. Trego*, 22 Pa. 368; *Huzzard v. Trego*, 35 Pa. 9; *Law v. People*, 116 Ill. 244, 4 N. E. 845; *Anderson v. Rider*, 46 Cal. 134; *Keen v. Sheehan*, 154 Mass. 208, 28 N. E. 150.

This rule has been followed and applied by this court: *Wass v. Smith*, 34 Minn. 304, 25 N. W. 605; *State v. Camp*, 79 Minn. 343, 82 N. W. 645. It is consistent with many relevant statutory provisions as to the nature of the interest transferred by a tax deed with which no other construction can be fully reconciled: Gen. Stats. 1894, secs. 1582, 1593,

1599, 1601, 1616, 1617. There is an especial reason why this should be the rule in this state because of the inadequacy of the means which the statutes provided for determining the amount of anterior taxes would seek to determine that amount: *Croswell v. Benton*, 54 Minn. 264, 55 N. W. 1125.

On the other hand, there is a strong argument for the rule which would enable the state to realize out of the lands all taxes and assessments which have been assessed against it, and which would take away <sup>400</sup> from persons seeking to evade the payment of lawful public charges by the device of asserting title under a later lien and thereby cutting out prior taxes. Well-considered authorities recognize that the question is primarily one of statutory construction, that there is no intrinsic reason why the statutes should not make the purchaser at a tax sale responsible for former taxes, and that, where in fact upon a reasonable construction of relevant statutory provisions it appears that the legislature has so provided, it is the duty of the courts to enforce the remedy: See *Western Land & E. Co. v. Guinault* (C. C.), 38 Fed. 287; *Gulf States Land Co. v. Parker* (C. C.), 60 Fed. 974; *Gulf States Land etc. Co. v. Parker* (C. C.), 72 Fed. 399; *Justice v. City of Logansport*, 101 Ind. 326; *Adams v. Osgood*, 42 Neb. 450, 60 N. W. 869; *State v. Werner*, 10 Mo. App. 41; *Smith v. Laumier*, 84 Mo. 672; *Mayor of Nashville v. Cowan*, 78 Tenn. 209.

This principle was in a measure applied by this court in *State v. Kipp*, 80 Minn. 119, 82 N. W. 1114. The syllabus in that case reads as follows: "A purchaser at a tax sale, as well as a person who procures an assignment from the state after lands have been bid in at a tax sale, takes a certificate of purchase or an assignment subject to the statutory right of the state to enforce the collection of a prior tax, when refundment has been made on account of a void sale as provided in General Statutes of 1894, sections 1610, 1697." The last part of that syllabus summarizes the effect, but does not accurately reproduce the doctrine, of the opinion. Justice Collins in that case said: "The lien or right of the state to enforce the senior tax was lost because the state had not been exempted by statute from the general rule that tax liens take priority in the reverse order of other liens. But where the tax sale is void under the decisions of our courts, or where it has itself been held void, and for that reason a refundment

has been made under either of the sections before mentioned (sections 1610, 1697), the state is expressly authorized again to proceed. It is in direct terms exempted from the operation of the general rule which governed the Camp case in the absence of a statute. The disposition of these cases is in exact harmony. In *State v. Camp*, 79 Minn. 343, 82 N. W. 645, there was no statute which protected or aided the state as to its claim for the unpaid senior tax. In this there is an unambiguous and explicit statute, which fully authorizes and empowers the state again to proceed and enforce the collection of the senior tax."

<sup>410</sup> In no appeal on this subject to this court has its attention ever been directed to this part of section 1631, namely: "If any tax on any property liable to taxation is prevented from being collected for any year or years by reason of any erroneous proceedings or other cause, the amount of such tax which such property should have paid shall be added to the tax on such property for the current year."

Within the rule laid down in *State v. Kipp*, 80 Minn. 119, 82 N. W. 1114, this is "an unambiguous and explicit provision which fully authorizes and empowers the state to proceed and enforce the collection of a senior tax," just as clearly as was authorized so to do by the relevant portion of sections 1610 and 1697. That previous proceedings to collect the taxes had been instituted by the state, and that in course of them land had been bid in by the state and title had accrued to the state, does not constitute payment of taxes (*Gen. Stats. 1894*, secs. 1606, 1607; *Mulvey v. Tozer*, 40 Minn. 384, 42 N. W. 387), nor estop the state from waiving such previous proceedings and such sales and titles, nor prevent the state from commencing further proceedings, making further sales, and creating further titles for the same tax as to the same land in subsequent years as for uncollected taxes. The law may provide, as this part of section 1631 provided, for the sale of all land upon which taxes for previous years had become delinquent and had not been satisfied by payment, redemption or sale of land to actual purchasers: *Knudson v. Curley*, 30 Minn. 433, 15 N. W. 873; *Farnham v. Jones*, 32 Minn. 7, 19 N. W. 83; *State v. Baldwin*, 62 Minn. 518, 65 N. W. 80; and see *Croswell v. Benton*, 54 Minn. 264, 55 N. W. 1125; *McHenry v. Kidder County*, 8 N. Dak. 413, 79 N. W. 875; *League v. State* (Tex. Civ. App.), 56 S. W. 262; *Clarke v. Strickland*,

Fed. Cas. No. 2864, 2 Curt. 439; *Hodgdon v. Burleigh* (C. C.), 4 Fed. 111.

A later tax judgment does not of necessity preclude the right of the state to assert rights based upon an assessment for earlier taxes: See *State v. Weyerhauser*, 72 Minn. 519, 75 N. W. 718; *Weyerhauser v. State*, 176 U. S. 550, 20 Sup. Ct. Rep. 485, 44 L. ed. 583. In *Countryman v. Wasson*, 78 Minn. 244, 80 N. W. 973, 81 N. W. 213, it was held that, where land has been bid in for the state at a tax sale, and has not been redeemed, or the interest of the state assigned, the state may obtain a tax judgment and sell the land for the taxes for subsequent years; and <sup>411</sup> under such circumstances the sale will not extinguish the lien of the state for the prior taxes for which it was bid in.

It is plain that there is good reason and specific authority for deciding this case either way, that it is not possible to decide it without doing violence to just and weighty considerations, and that the balance in favor of either conclusion is not pronounced. Nor are we without grave doubt on the subject. But upon the whole we conclude, in view of the statutory provisions and decisions referred to, that the purchaser of a tax title may be required to protect his interest, not only as against all subsequent taxes, but also against anterior taxes, and that a tax title based on a sale under a later tax may prevail over a later tax sale on an earlier tax lien, and that in this case the ruling of the trial court was correct.

Order affirmed.

A reargument having been granted, the following opinions were filed on October 26, 1906:

JAGGARD, J. The first consideration urged by counsel for the plaintiff and appellant on reargument was that as a general rule of law the tax lien last in time is first in right, and that this rule applies to the state as well as to an individual. Inter alia, he cited *Gates v. Keigher*, 99 Minn. 133, 108 N. W. 860. It was there held that where lands have been sold for taxes, and the purchaser thereafter perfected his title thereunder, the state could not impeach such title by resale of land for taxes due and unpaid for prior years. The distinction between that case and the one at bar is as plain as it is substantial. In this case the purchaser had not perfected his title before the resale of lands. In *Gates v. Keigher*, 99

Minn. 138, 108 N. W. 860, he had. After a careful reconsideration of the question, we have concluded to adhere to the conclusion on this point announced in the original decision, namely, that whether a later sale on an earlier tax lien should take precedence over an earlier sale on a later lien is primarily a question of statutory construction; that the statutes of this state in certain cases have so provided; and that the case at bar is one of these cases by virtue of section 1631 of the General Statutes of 1894.

The second point, pressed with great ability and earnestness upon reargument, <sup>412</sup> was that chapter 322, page 410 of the Laws of 1899 could not operate to make the lien of the 1892 tax superior in right to the later liens upon which plaintiff's title is based. The argument was that this law did not change the usual rule as to priority of tax liens and could not constitutionally affect the rights of the plaintiff under his tax certificate, because these certificates constituted a contract with the state, the obligation of which could not be impaired by subsequent legislative change, and by this law of 1899 in particular.

While the matter is not without doubt, we have concluded that the proper view to be taken on this matter is as follows: The legal effect of the portion of section 1631, quoted in full in the original opinion, was to provide for two things, namely: 1. If any tax on any property liable to taxation is prevented from being collected by reason of any erroneous proceeding, or other cause, then the state shall have a lien on the property for such tax which may be subsequently enforced; 2. That this lien may be enforced by adding to the tax on such property for the current year the previous uncollected tax. In brief, by this section the priority of liens was determined and the state was authorized to collect the tax in the way specified. It was competent for the legislature to provide other means for the enforcement of that uncollected tax; so to do was merely to give an additional remedy. The addition was to the law adjective only, and not to the law substantive. It is elementary that such remedial legislation is constitutional, and not void as an attempt to take property without due process of law. It was competent for the state to proceed to collect its revenues by means of the new remedy. It was therefore not legally significant that the remedy provided by section 1631 was not pursued.

A further question was raised by the plaintiff's insistence that the right of the state to enforce its lien under section 1631, even if it otherwise existed, was barred by the statute of limitations before the plaintiff made its payment in this case. The facts upon which this proposition rested are not clear upon the record. The burden rested upon the plaintiff to affirmatively show the bar of the statute; this it has failed to do. The reason for this, which the paper book suggests, is that in point of fact the plaintiff could not show the necessary facts, and that the proceeding by the state to enforce its lien was commenced a few days, at least, before the six years statute had run.

413 We have considered the other points raised on the reargument, which appear to call for no special amplification here, and conclude to adhere to the conclusion reached in the previous opinion.

Order affirmed.

LEWIS, J., Concurring. In my judgment this case was correctly decided, and the decision should be adhered to, but I prefer to place my decision upon somewhat different grounds.

In my opinion, it was the legislative intent, as expressed in section 1610 of the General Statutes of 1894, to preserve or renew the state's lien for the taxes levied in prior years, whenever the tax sale for such prior years is adjudged void. In the case at bar the state had bid in the premises at the tax sale for the 1892 taxes, but had never made any assignment. So the real question presented here is: The tax sale for the prior years having been declared void by a judgment of the court entered May 5, 1894, was the state's lien for such prior years revived and enforceable notwithstanding no assignment had been made? I think so, within the first provision of section 1610, viz.: "When any tax sale is declared void by judgment of court, such judgment shall state for what reason such sale is annulled." And the subsequent provision, commencing: "Such proceedings shall not operate as a payment," etc. There is no distinction in principle between this case and cases where the state had assigned, or cases where the premises had been bid in by a purchaser and refundment had followed. That it was the intention to preserve the state's lien for taxes

in all cases of void sales is further evidenced by section 1697, which provides that the county auditor may refund the amount paid for a tax certificate when satisfied that the sale is void under a decision of the supreme court, "and the same proceedings shall be had for reassessing said property for said taxes, or again selling the same as provided by law in other cases of void assessment of sales."

Section 1631 has much wider scope and covers cases where there has been an entire omission of assessment, as well as cases where taxes have been prevented from collection by some erroneous proceedings, without reference to a judicial determination. Harmonizing all of these provisions, I am inclined to the opinion that section 1631 is intended <sup>414</sup> to apply to instances not otherwise covered. However that may be, it is not necessary in this case to resort to it, ample remedy having been provided by section 1610.

I concur in the holding that the legislature had power to provide for the enforcement of such taxes by the law of 1899, rather than leave the state to the statutory method of including them with the taxes for the current year in the next delinquent tax sale.

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*The Recovery of Voluntary Payments*, including payments of taxes, is the subject of a note to New Orleans etc. Co. v. Louisiana etc. Co., 94 Am. St. Rep. 408-444. As to whether a payment of illegal taxes made in order to record a deed of the property is involuntary so that the money can be recovered, see page 432 of this note.

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### STROM v. STROM.

[98 Minn. 427, 107 N. W. 1047.]

**LIABILITY OF HUSBAND to Wife for Personal Torts.**—A woman cannot, either before or after her divorce, maintain a civil action against her husband for a personal tort committed by him against her during coverture. (p. 389.)

Nye & Deutsch, for the appellant.

John Lind and A. Ueland, for the respondent.

<sup>427</sup> **START, C. J.** This is an action to recover damages for personal injuries alleged to have been received by the

plaintiff by reason of an assault alleged to have been committed upon her by the defendant on April 11, 1905. The answer denied the assault, and, as a second defense, alleged that at the time of the alleged assault the plaintiff and the defendant were husband and wife, living together as such; and as a third defense it alleged a judgment dissolving the marriage of the parties at the suit of the plaintiff on account of the alleged assault, and awarding to her permanent alimony in the sum of five thousand one hundred dollars, which the defendant paid. The plaintiff demurred to the second and third defenses on the ground that the same do not state facts sufficient to constitute a defense. The trial court made its order overruling the demurrer from which the plaintiff appealed.

The sole question for our decision is: Can a wife maintain a civil action against her husband for a personal tort committed by him against her during coverture? It is the contention of the plaintiff that she can by virtue of the General Statutes of 1894, section 5530, which reads as follows: "That from and after the passage of this act, women shall retain the same legal existence and legal personality after marriage <sup>428</sup> as before marriage, and shall receive the same protection of all her rights as a woman which her husband does as a man; and for any injury sustained to her reputation, person, property, character or any natural right, she shall have the same right to appeal, in her own name alone, to the courts of law or equity, for redress and protection that her husband has to appear in his name alone; provided, this act shall not confer upon the wife a right to vote or hold office, except as is otherwise provided by law."

This statute gives to a married woman the same right of action in her own name for any injuries sustained to her reputation, person, or property as her husband has in his own name to maintain an action for like injuries sustained by him, and no other or greater right. The purpose of the statute was to place the husband and wife on an equality as to actions by either for injuries to person, reputation or property. The husband cannot, and never could, bring an action against his wife for a personal tort committed by her against him during coverture. It follows that the statute does not authorize her to bring an action against him for a personal tort committed by him against her during coverture, for her



rights in this respect are expressly limited by the statute to the rights which the law gives to him. The statute authorizes a married woman to maintain an action in her own name against her husband or anyone else for injuries to her property or to her person, except that she cannot maintain a civil action against her husband for a personal tort committed by him against her during coverture. Nor can he maintain a similar action against her. The disabilities in this respect are mutual.

Counsel for plaintiff, however, urges that the right to maintain an action for a personal tort is a property right, hence it falls within the express terms of the statute. But, as we have stated, the right of a married woman to maintain an action against her husband for a personal tort is not given by the statute. There being no right of action in this respect, it follows of necessity that there is no property right to protect: See *Peters v. Peters*, 42 Iowa, 182.

The demurrer was properly overruled.

Order affirmed.

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*A Wife cannot Maintain an Action* against her husband, either before or after divorce, for a personal tort committed on her during coverture: *Bandfield v. Bandfield*, 117 Mich. 80, 70 Am. St. Rep. 550; *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; note to *Frankel v. Frankel*, 73 Am. St. Rep. 270.

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### McNAUGHTON v. WAHL.

[99 Minn. 92, 108 N. W. 467.]

**SALE—Warranty of Quality not a Separate Contract.**—On the sale of personal property a warranty of its quality is not a separate and independent contract, but one of the terms of the contract of sale. (p. 393.)

**SALE—Parol Evidence of Warranty.**—Where, in the absence of fraud or mistake, the written contract for the sale of personal property is complete in itself, but silent upon the subject of warranty, oral evidence is not admissible to show a warranty of quality. (p. 393.)

H. B. Fryberger, for the appellant.

A. E. McManus, for the respondent.

**33** **START, C. J.** This is an appeal from a judgment of the municipal court of the city of Duluth. Neither party

raised the question whether a direct appeal lies from that court to this court. The question is an important and doubtful one, and we do not deem it advisable at this time to raise and decide it on our own motion without the aid of argument by counsel.

The action was brought to recover damages for a breach of warranty on the sale of a churn drill outfit. The complaint for the first cause of action alleged the sale, representation, and warranty as to the condition and quality of the drill, breach thereof, and general damages in the sum of four hundred dollars; and as a second cause of action that the plaintiff, in reliance upon the warranty and representations as to the condition and quality of the drill, incurred expense in causing it to be overhauled and examined, and railroad fare and wages of the men, in the sum of ninety dollars. There is, as plaintiff's counsel conceded, "not a single allegation of fraud in the complaint." The answer admitted the sale and put in issue the other allegations of the complaint. The jury returned a verdict for the full amount claimed on the first cause of action, and for twenty-five dollars on the second one. Judgment was entered on the verdict, from which the defendant appealed.

The first alleged error urged by the defendant is that the trial court erred in receiving oral evidence of a warranty over his objections and exceptions, for the reason that the contract of sale was in writing. The bill of sale is in these words:

"Know all men by these presents, that T. W. Wahl of the county of St. Louis, state of Minnesota, party of the first part, in consideration of the sum of four hundred dollars to him in hand paid by Peter McNaughton, of the county of St. Louis and state of Minnesota, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, <sup>94</sup> and convey unto the said party of the second part, his executors, administrators, and assigns, forever, the following described goods, chattels, and personal property, to wit: Churn drill outfit located at Croxton mine, St. Louis county, Minn.

"To have and to hold the same unto the said party of the second part, his executors, administrators, and assigns, forever. And the said party of the first part, for himself, his

heirs, executors, and administrators, covenants and agrees to and with the said party of the second part, his executors, administrators, and assigns to warrant and defend the sale of the said goods, chattels, and personal property hereby made unto the said party of the second part, his executors, administrators and assigns, against all and every person or persons whomsoever, lawfully claiming or to claim the same.

"In testimony whereof the said party of the first part has hereunto set his hand and seal this 27th day of November, A. D. 1905. T. W. WAHL. [Seal.]

"Signed, sealed, and delivered in presence of

"H. C. FULTON.

"WM. F. MOORE."

It was duly acknowledged. After it appeared on the trial that this bill of sale was executed and delivered, the plaintiff gave oral testimony tending to prove his alleged warranty and a breach of it. The evidence was duly objected to by the defendant, but it was received over his objections and exceptions.

The first alleged reason urged by the plaintiff why the evidence was properly received is that the bill of sale was "executed by defendant and delivered to plaintiff after the purchase price had been paid, and was executed by defendant only, and never seen by plaintiff until the transaction was completed." The record does not support the claim, and the reason urged is not valid. The agent of the plaintiff who negotiated the purchase of the drill for him and was called as a witness for him testified as to representations made by the defendant as to the condition of the drill and further as follows: <sup>95</sup> "He said he would take four hundred dollars. I said that was all right; I would take it. I would take his word for it and guarantee that it was all right. He said it was. I told him to make out the bill of sale and I would get a check, so I brought over a four hundred dollar check to the office. He was not there, but his clerk handed me the bill of sale, and I handed him the check for four hundred dollars. He also gave me a letter from Mr. Sellwood."

The letter was an order for the delivery of the property to the plaintiff. This shows that the payment of the purchase price and the delivery and acceptance of bill of sale were a

part of the same transaction, and the consummation of the sale and purchase.

It is further insisted by the plaintiff that the bill of sale was merely given in part performance of the contract of the parties, that it is incomplete, and does not purport to contain any contract as to the warranty of the condition or quality of the drill, hence, evidence tending to show an oral warranty was properly received.

The cases of *Healy v. Young*, 21 Minn. 389, and *Germania Bank v. Osborne*, 81 Minn. 272, 83 N. W. 1084, are cited in support of this claim. Neither of them is here in point.

The first one cited was an action to recover rent for personal property, a newspaper plant, upon a written lease thereof. One of the defenses was that subsequent to the execution of the lease the defendant purchased the plant and paid fifteen hundred dollars, and further that in consideration of such purchase and payment by the defendant of the fifteen hundred dollars the plaintiff released all claims growing out of the lease. To prove this defense, the defendant introduced the bill of sale for the plant in evidence, and then offered parol evidence of the agreement to release the rent in consideration of such purchase. It was held that the agreement related to a different subject matter from that covered by the bill of sale, and therefore that parol evidence of such agreement did not tend to contradict, add to, or vary the terms of the bill of sale, and, further, that it was admissible. Or, in other words, the agreement as to the rent was a distinct collateral matter from that covered by the bill of sale; hence it necessarily followed that it could be proven by parol evidence.

<sup>96</sup> The second case relied on was an action on a promissory note. The answer alleged as a defense and counterclaim that the note was given in payment of certain shares of stock under an agreement that the plaintiff would repurchase the stock by returning the note whenever the defendant desired to return or resell it, that he had offered to return the stock, and demanded the note. It was held, following *Healy v. Young*, 21 Minn. 389, that parol evidence to prove the agreement as to the repurchase of stock was admissible.

Now, it is clear that these cases are not relevant to the question here under consideration, and that the oral evidence of the warranty in this case was not admissible, unless an oral

warranty on the sale of personal property is a separate and independent collateral contract. The settled law of this state is that on the sale of personal property a warranty of its quality is not a separate and independent contract, but one of the terms of the contract of sale, and further that where in the absence of fraud or mistake, the written contract of sale, that is, the bill of sale, is complete in itself, but silent upon the subject of warranty, oral evidence is not admissible to show such warranty: *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1; *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.*, 66 Minn. 156, 68 N. W. 854; 2 Page on Contracts, sec. 1225. As examples of incomplete written memoranda or contracts within the rule, see the cases of *Beyerstedt v. Winona Mill Co.*, 49 Minn. 1, 51 N. W. 619, and *Potter v. Easton*, 82 Minn. 247, 84 N. W. 1011. A mere inspection of the bill of sale in this case discloses that it imports a complete legal obligation, and it must be presumed to contain all the terms of the contract of sale; hence, oral evidence of a warranty as to the quality or condition of the drill was not competent. The bill of sale contained a warranty of title to the drill. This by necessary implication excluded any warranty of its quality: *Bradford v. Neill*, 46 Minn. 347, 49 N. W. 193.

The trial court erred in receiving the parol evidence of warranty, and a new trial of the action must be granted for this reason. In reference to such trial we deem it proper to say that the alleged expense incurred by the plaintiff in causing the drill to be overhauled and examined after the sale is not a proper item of damages in an action for the breach of an alleged warranty of the quality of the drill. It is too remote, and could not have been within contemplation of the <sup>97</sup> parties. What the rule would be in an action to recover damages for false and fraudulent representations we do not assume to decide.

Judgment reversed and new trial granted.

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*Under a Written Contract of Sale Containing No Warranty*, parol evidence is generally not admissible to add one: *McCray Refrigerator etc. Co. v. Woods*, 99 Mich. 269, 41 Am. St. Rep. 599; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 41 Am. St. Rep. 33; note to *Green v. Botson*, 5 Am. St. Rep. 197.

*Warranties of Quality Implied in Sales* are discussed in the note to *Gold Ridge Min. Co. v. Tallmadge*, 102 Am. St. Rep. 607.

**BAART v. MARTIN.**

[99 Minn. 197, 108 N. W. 945.]

**REGISTRATION OF TITLE—Torrens System—Publication of Summons.**—When the name of a claimant to land is known to an applicant for registration of title, either from the report of the examiner or other sources, the summons cannot be served on such claimant by publication unless his name appears in the summons. (p. 401.)

**REGISTRATION OF TITLE—Torrens System—Indefeasible Title.**—The purpose of the Minnesota Torrens law is to create an indefeasible title in the person adjudged to be the owner, and in the absence of fraud the decree is final, unless reversed or modified as authorized by the statute. (p. 402.)

**STATUTES—Implied Exceptions.**—The General Terms of a statute are subject to implied exceptions founded in the rules of public policy and the maxims of natural justice, so as to avoid absurd and unjust consequences. (p. 408.)

**REGISTRATION OF TITLE—Torrens System—Effect of Fraud.**—If the registration of title to land under the Torrens system is obtained by fraud, the decree and the certificate of registration issued thereunder may be vacated and set aside, unless a bona fide purchaser has secured rights on the faith of the record, notwithstanding the statute contains no express exception in case of fraud. (p. 409.)

**REGISTRATION OF TITLE—Torrens System—Effect of Fraud.**—If the registration of a title has been procured by fraud, the defrauded party, if not guilty of laches, may attack the decree so long as the land stands registered in the name of the party guilty of the fraud. (p. 410.)

Tryon & Booth, for the appellants.

Flanner & Cooke, for the respondent.

<sup>197</sup> ELLIOTT, J. On September 27, 1897, Katherine Martin and Michael Martin made their promissory note, whereby they promised to pay to Casper Ernst, or order, eighteen hundred and fifty dollars, on September 27, 1900. To secure the payment of this note, the Martins executed and delivered to Ernst a first mortgage on lot 1, block 4, in Morrison's addition to Minneapolis.

The mortgage was recorded in the office of the register of deeds for Hennepin county on November 2, 1897. The note and mortgage <sup>198</sup> were assigned by Ernst to the respondent, Baart, and the assignment was duly recorded in the office of the register of deeds on August 27, 1898. The papers were thereafter in the respondent's possession at his home in

Michigan until the commencement of this action. The time of payment was extended, and the interest on the note was regularly paid to respondent up to September 27, 1903. The respondent has resided at Marshall, state of Michigan, since 1883.

On January 31, 1899, Casper Ernst, or some person in his behalf, forged respondent's name to a power of attorney to A. Mueller, an employé of Ernst, purporting to authorize Mueller to foreclose the Martin mortgage. Acting under this forged power of attorney, Mueller went through the form of foreclosing the mortgage because of an alleged default in the payment of interest, amounting to seventy-four dollars, due on September 27, 1898. At the sale on March 22, 1899, the property was bid in in the name of respondent for two thousand one hundred and two dollars and eighty-two cents. At the time of the alleged foreclosure there was no default in the mortgage. Respondent had no notice or knowledge of the power of attorney or the attempted foreclosure until November 15, 1903. On March 21, 1901, Casper Ernst, or some person in his behalf, forged respondent's name to a deed purporting to convey said land to appellant John Carl. Respondent had no notice or knowledge of the existence of this forged deed until November, 1903. In November, 1903, respondent, being then in Minneapolis, arranged with McGowan & Mahoney, of Minneapolis, to look after his matters, including this mortgage, and through them he sent a letter to appellant John Carl, on November 21, 1903. Shortly after this letter was sent, Carl called at McGowan & Mahoney's office and had a conversation with McGowan, in which he said that he had come in response to that letter. McGowan told him they held the Baart mortgage, and that the interest would be payable at their office. Carl was there some time engaged in conversation with McGowan. He appeared nervous and worried over this mortgage. Carl applied to the Minnesota Title Insurance and Trust Company, and obtained a policy of title insurance on said lot for two thousand five hundred dollars, dated December 5, 1903. On December 15, 1903, he made and verified his application in writing to have the title to the lot registered under the Torrens law. The application was filed in <sup>190</sup> the office of the clerk of the district court for Hennepin county on January 23, 1904, and in the office of the register of deeds on January 25, 1904. On

January 29, 1904, the application was referred to an examiner, who reported an unencumbered fee title in Carl. The respondent had no knowledge of the pendency of registration proceedings.

This action to foreclose said mortgage was commenced January 2, 1904, and the summons and complaint were served upon Carl and his wife on February 7, 1904. Carl took the summons and complaint so served upon him to the Minnesota Title Insurance and Trust Company on February 18th, and made a claim on account of said policy of insurance. The company turned the summons and complaint over to its attorneys, and they prepared the answer to the complaint for Carl and wife. Respondent made his reply thereto, dated March 21, 1904. A notice of lis pendens in the foreclosure suit was filed in the office of the register of deeds on March 3, 1904. March 5, 1904, Carl elected to proceed with his registration proceedings, and the summons was issued in accordance with the examiner's report, and served and published. The respondent, Baart, was not named, but the usual reference was made to persons unknown. The proceedings for registration came before the court for hearing on May 10, 1904. There was no defense, and, on May 11, 1904, a decree was made and the title registered in John Carl as the owner in fee. On September 22d, thereafter, Carl deeded the land to the intervener, Deane. Carl's owner's duplicate certificate was surrendered and the lot was registered in the name of Deane.

The trial court found:

"(a) That as soon as said plaintiff received notice of said forged power of attorney and deed and said unauthorized foreclosure, he caused notice of the facts aforesaid to be given to said John Carl. And ever since December 1, 1903, said John Carl has at all times had full notice and knowledge of the plaintiff's name and address and of all facts hereinbefore set forth, and that said plaintiff had and owned an unsatisfied first lien upon said premises under and by virtue of said mortgage, to secure said sum of eighteen hundred and fifty dollars, with interest thereon, together with the sum paid for insurance as hereinbefore set forth, and that neither said forged deed, or any other paper or writing pertaining <sup>200</sup> to said unauthorized foreclosure, was lawfully of record, and



that eliminating such writings, theretofore unlawfully and wrongfully placed of record, said defendants Martin appeared of record to be, as they in fact were, the owners of the fee of said land, and that said plaintiff appeared also of record to be, and was in fact, the owner and the holder of a lien upon said land, unsatisfied and undischarged as hereinbefore stated and shown.

“(b) That immediately upon so receiving notice and knowledge of the facts aforesaid, said John Carl obtained from the Minnesota Title Insurance and Trust Company, a corporation doing business in the city of Minneapolis in said county, its policy or contract of insurance, wherein and whereby said company promised and agreed to pay to said John Carl the sum of two thousand five hundred dollars, in case his title to said land should prove to be defective and he ejected therefrom.

“(c) That thereupon said John Carl, with full notice and knowledge of all the facts aforesaid, sought to secure a registration of his title, under and pursuant to the provisions of chapter 237 of the Laws of 1901, and acts amendatory thereof, and with intent to defraud said plaintiff of his said mortgage lien, sought to obtain such registration in such manner that no notice of the proceedings theretofore should be given to or received by said plaintiff until more than sixty days should elapse after the entry of the decree therein. And with such intent, and having such purpose in view, said John Carl, on January 23, 1904, made application to this court to have the title to said land registered, which application was made in writing, was signed and verified by the oath of said John Carl as applicant, and was filed with the clerk of this court on the day last stated; a duplicate thereof being also, upon the same day, filed in the office of the register of deeds. That although when said John Carl, as such applicant, verified and filed such application, he was fully advised of all the facts above stated, he omitted to make any reference therein to plaintiff's said mortgage, or to his lien upon said premises existing by reason thereof, and, on the contrary, falsely and corruptly averred in said application that he was the owner in fee of said premises; that no person except himself appeared of record to have any title, claim, estate, lien, or interest, in, to, or upon said premises; that the same were

not subject to any lien or encumbrance; and that no person except <sup>201</sup> himself had any estate or claimed any interest therein or thereto.

“(d) That thereupon said plaintiff, having no knowledge of the pendency of said registration proceedings, or any notice thereof, except such constructive notice, if any, as should be implied from the fact that a duplicate copy of said Carl’s application therein was on file in the office of the said register of deeds, brought this action; the summons and complaint therein being personally served upon said defendants Carl early in the month of February, 1904, and being thereupon, and on the eighteenth day of said month delivered by Carl to his attorneys herein, who were and are also attorneys for the said title insurance and trust company. And on March 4, 1904, said plaintiff duly filed in the office of said register of deeds a notice of the pendency of this action.

“(e) That because of the false and corrupt statements of fact set forth in said application of said John Carl, hereinbefore mentioned, and not otherwise, the examiner of titles, by his report in said proceedings, made pursuant to section 17 of said chapter 237, did not, as he would have otherwise done, make report that said applicant had no title proper for registration, but did, on the contrary, report that said Carl had title in fee to said premises, free and clear of any encumbrance whatsoever, and did not, as he would otherwise have done, make report that said plaintiff should be made a party defendant therein.

“(f) That on March 5, 1904, said John Carl caused to be filed in said registration proceedings an affidavit of his attorney therein, praying that a summons might issue in said matter, and caused it to be falsely stated and set forth in said affidavit that the only persons to be made defendants in said proceedings were Alzeoir O. Brusha and D. E. Pelo; and by reason of said false application of said John Carl and said affidavit, obtained from this court an order directing its clerk to issue a summons in said proceedings which did not name the plaintiff as one of the defendants therein; and this, although the name and residence of said plaintiff, and his lien and claim of lien to said premises, were not at the time unknown, but were, on the contrary, well known, to said applicant, said John Carl.

“(g) That thereafter such proceedings were had in said registration proceedings that on May 10, 1904, the same came before this court <sup>202</sup> upon the application of said John Carl for a final decree therein; and at such hearing then had before said court, said John Carl was sworn, and testified, before said court, that there was no mortgage upon said premises, and that he did not know of any lien, claim, or mortgage, or anything against the same; which said testimony so given by said John Carl, as aforesaid, was false and untrue, and was known by him at the time so to be. And thereupon this court, induced by such testimony of said Carl, as well as by the report of the examiner in said proceedings, rendered its final decree therein, confirming the title of said John Carl to said premises and ordering registration of the same, adjudging him to be the owner in fee simple of said real estate, subject only to the rights and encumbrances specified in section 30 of said chapter 237, and to inchoate right of dower of his wife therein. And a certified copy of said decree was thereupon, and on the eleventh day of May, 1904, filed in the office of the registrar of titles in said county, and a certificate, and duplicate certificate of title made and executed in conformity therewith.

“(h) That the summons in said registration proceedings was never served upon the plaintiff herein as required by section 20 of said chapter 237, or otherwise, nor did the clerk of said court mail a copy of said summons to said plaintiff as required by section 20-A of said chapter, nor did his name appear in said decree of registration or in the application or summons, or examiner's report, or in any paper contained in or constituting any part of the files or records in said proceeding. That plaintiff did not appear in any way in said proceedings, or have any notice thereof, or of any of the steps taken therein, until October 5, 1904, when said plaintiff ascertained, and for the first time received, notice of said pleadings from reading the complaint of said intervenor herein, and the proposed supplemental answer of said defendants Carl, together with the affidavits thereto attached, which were served upon plaintiff's attorneys herein on the twenty-third day of September, 1904.

“(i) That on September 22, 1904, said John Carl and his said wife executed and delivered to Clarence H. Deane, the intervenor herein, a quitclaim deed of said premises; and

thereupon, upon the presentation of said quitclaim deed in the registrar of titles, the said certificate of title theretofore made was canceled, the duplicate certificate theretofore <sup>203</sup> issued to said John Carl was surrendered and canceled, and a new certificate of title to said intervener thereupon entered by said registrar, and a new duplicate certificate thereupon issued and delivered to him. That said defendants Carl received as consideration for said deed the sum of two thousand five hundred dollars in cash, no part whereof was paid by said Deane. That said Deane received such title as was conveyed by said quitclaim deed, if any title was in fact conveyed thereby, for the use and benefit of the said Minnesota Title Insurance and Trust Company, by which the said sum of two thousand five hundred dollars was paid to said Carl. That said intervener, Clarence H. Deane, did not purchase from said defendants Carl said premises in good faith or for value. That at the time said quitclaim deed was so given and received, and said sum of two thousand five hundred dollars paid therefor, said intervener, and the said Minnesota Title Insurance and Trust Company, and each and both of them, had full notice and knowledge of all facts hereinbefore stated and found, and the sole motive and purpose of said intervener and the said company in procuring said quitclaim deed, and in the payment of said sum of two thousand five hundred dollars, was to enable said Deane to intervene herein, and, together with the said defendants Carl, falsely assert the claim and alleged defense that said Deane was an innocent purchaser of said land, and thereby defraud said plaintiff out of his lien and claim under said mortgage.

“(j) That all sums of money which had been paid to the registrar of titles of said county prior to the trial of this action, as provided in section 83 of said chapter 237 of the Laws of 1901, did not exceed in the aggregate the sum of four hundred and seventy-five dollars.

“(k) That the decree of registration hereinbefore mentioned was not at the trial of this cause offered in evidence by or on behalf of the defendants Carl, or either of them. That said decree was offered in evidence by said intervener alone, and was received in support of the allegations of his intervening complaint herein, and not otherwise. And no evidence was offered at said trial by said intervener, or received in his

behalf, tending to show any taxes paid or improvements made upon said mortgaged premises."

A judgment and decree was ordered, annulling and canceling the power of attorney, the sheriff's certificate of sale, and all papers referred to therein, the warranty deed, the decree of registration, and all <sup>204</sup> certificates of title entered or issued in pursuance thereof, and so far as it in any wise impairs or affects the plaintiff's lien on the real estate under and by virtue of his mortgage and directing the foreclosure of the plaintiff's mortgage and the sale of the lot thereunder.

The appellant Deane makes numerous assignments of error, and four of them are also assigned on behalf of the appellants Carl. The intervener questions the correctness of the conclusions of law, and especially of the findings of fact: (1) That Carl had notice of the rights of Baart before the summons in the foreclosure suit was served upon him; (2) that Baart had no notice of the registration proceedings; (3) that the title insurance and trust company and the intervener, Deane, had notice of the fraud by which the registration of the title was secured; and (4) that Deane was not a bona fide purchaser for value. We do not find it necessary to discuss these issues of fact, as we are convinced that there is ample evidence to support the findings.

1. The fact that Baart claimed a mortgage lien upon the land in question was known to Carl before he obtained title insurance, and before he filed the application for registration. It was therefore necessary that Baart's name should appear in the summons: *State v. Westfall*, 85 Minn. 437, 89 Am. St. Rep. 571, 89 N. W. 175, 57 L. R. A. 297; *Ware v. Easton*, 46 Minn. 180, 48 N. W. 775. In order that the examiner may be able to know and report to the court who are necessary parties, the law contemplates and requires that the applicant shall in good faith give the information in his application which is required by section 3375 of the Revised Laws of 1905. When the name of a claimant is known to an applicant, either from the report of the examiner, as in *Dewey v. Kimball*, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704, or from other sources, the summons cannot be served on such claimant by publication unless his name appears in the summons. As he is not an "unknown party," the concealment of his claim is a fraud on the court, and the decree therein entered is as to him of no force and effect.

<sup>205</sup> 2. It is contended by respondent that Carl could not obtain an indefeasible title under the Torrens law, because his claim rested upon a forged instrument which conferred no rights whatever upon him. This contention rests upon the theory that a person is entitled to register a title which he already has, and that registration alone cannot create a title. We think the purpose of the statute was to create an indefeasible title in the person adjudged to be the owner, and who thus becomes the original registered proprietor. In the absence of fraud, the decree is final, unless reversed or modified as authorized by the statute. The instruments produced at the hearing to establish the applicant's title are evidence upon which the court is required to act, and its conclusion, as embodied in the decree, is conclusive. A subsequent registration obtained through the instrumentality of a forged deed would be governed by different considerations. As is well known, the Torrens system originated in South Australia, and has for years been in force in the states of the Australian confederation and in New Zealand. With various modifications, it has been adopted in Massachusetts, Illinois, California, Oregon, Minnesota, Colorado, Hawaii, the Philippine Islands, Ontario, and Manitoba. These statutes differ somewhat in their details, but the primary purpose of all is the creation of an indefeasible title in the registered owner, and the simplification of the transfer of land.

There has been a difference of opinion as to the nature of the title which is subject to registration under these statutes. It was inferred from the case of *Gibbs v. Messer*, [1891] App. Cas. 248, and held by numerous decisions, that the system is intended to confer an indefeasible title upon one only who deals with a person actually registered, and deals with him on the faith of the register. The full force of the argument in favor of this view appears in the following language quoted from *Mere Roihi v. Assets*, [1902] 21 N. Z. 691, 715. This was a case where the land had been registered by mistake. The court said: "It is unconscientious and unjust that any person not being a purchaser for value and in good faith should retain an estate without right or title merely because he happened to be entered upon the register as owner of such estate. . . . The statute was not passed for the purpose of enabling such persons unjustly and unconscientiously to retain the estates of others, but for the purpose of <sup>206</sup> sim-

plifying the title to and the dealing with estates in land." But other courts accepted a broader view, and held that the system contemplates conferring a good title for all purposes on a person who, but for his certificate, would have no title at all. This view which, of course, does not include cases of fraud, is now established in the states and colonies subject to the appellate jurisdiction of the privy council. It was recently held in *Assets v. Mere Roihi*, [1905] App. Cas. 177, that the merely erroneous registration and certification of an invalid title affords no ground for impeaching the statutory title of an original proprietor. A title may thus be created by the decree and certificate of registration. In this case no distinction is made between an original proprietor and one who has been placed on the register in succession to another registered proprietor. This may be correct, possibly, where the subsequent change in the register is the result of a mere mistake; but a registered proprietor can never be deprived of his title through the instrumentality of forged instruments: *Gibbs v. Messer*, [1891] App. Cas. 248.

3. But the important and controlling question in this case is: Can a decree of registration under the Minnesota Torrens law be attacked on the ground that it was obtained by fraud? The appellants rest their case squarely upon the words of the statute, and earnestly contend that the legislature intended to enact a law which, after the expiration of sixty days from the entry of the decree, would vest in the registered owner an absolutely indefeasible title, even though the registration was secured by the fraudulent practices of the person in whose name the land was registered. The Minnesota statute contains no express exception in favor of the owner of land which has been fraudulently registered in the name of some other person. The argument is that the importance of making the title absolutely indefeasible after the expiration of the period of limitation induced the legislature to depart from the ordinary rule, and permit a party who has been guilty of fraud to retain the benefits thereof, saving only for the defrauded land owner his right of action against the party guilty of the fraud, and a claim against the insurance fund provided for by the statute. The present case well illustrates the utter inadequacy of such remedy. The legislature never consciously  
207 provided a method by which such an unconscionable scheme might be successfully consummated.

(a) An examination of the Torrens laws of the different states and colonies discloses the fact that those of Minnesota and the Fiji Islands only contain no express exception of cases of fraud. All the original Torrens statutes carefully guard against the possibility of an owner being fraudulently deprived of his property.

That this important feature is sometimes overlooked is illustrated by a recent book on "Registering Titles to Land" by Jacques Dumas. It is there asserted that security and protection are in all cases obtained by combining two principles: (a) That registration can never be subject to ratification; and (b) that where a mistake has been made, the person suffering the injury is entitled to compensation out of the public funds according to the fact of liability. "There is an exception to the first of these principles," says the author (page 94), "in all other countries than Australia, when it is proved that registration has been obtained by fraud or error. But this exception does not weaken in the least the warranty afforded by registration since it has no effect on a bona fide purchaser for value." Elsewhere (page 37), in speaking of certain European systems, the writer says: "Another difference from the Australian system is that . . . when ever registration has been obtained by fraud, error, or compulsion, or when one of the parties is incapacitated, rectification can be obtained. This is subject, however, to the rights of third parties when acquired for value and in good faith in reliance on the correctness of the register."

As a matter of fact, all the Australian statutes provide that registration obtained by fraud is invalid, except as against bona fide purchasers for value upon the faith of the register. Under certain sections of the parent acts, a certificate of title is declared to be conclusive evidence of the proprietor's title to the land, but other sections which are to be read as provisos introduce exceptions to this conclusiveness: *Marsden v. McAlister*, 8 N. S. W. 300. A certificate of title, therefore, though properly registered and authenticated, is only conclusive, until it is shown to fall within one of the recognized exceptions: *Wadham v. Buttle*, 13 S. A. L. R. 1; *Main v. Robertson*, 7 A. L. T. (V) 127. In *Hogg on Australian Torrens System*, 823, it is <sup>208</sup> said: "Apart from any question of the special rights of the crown there seem to be three classes of cases in which the certificate of title will not be conclu-



sive, viz.: (1) Where a certificate of title of earlier date is in existence; (2) where the land has been made the subject (wholly or partially) of a certificate of title by mistake; and (3) where the certificate of title has been obtained by fraud." The South Australian statute (Acts No. 380, 1886, sec. 69) provides that: "The title of every registered proprietor shall, . . . be absolute and indefeasible, subject only to the following qualifications: (1) In case of fraud, in which case any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this act. Provided that nothing included in this subsection shall affect the title of a registered proprietor, who has taken bona fide for valuable consideration, or of any person bona fide claiming through or under him." In New Zealand (Act 1885, secs. 56, 182), it is provided that: "No action for possession or other action for the recovery of any land shall lie or be sustained against the registered proprietor under the provisions of the act of the estate or interest in respect to which he is so registered, except in any of the following cases, that is to say: . . . (3) The case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud." In all other cases the register is conclusive; any rule of law or equity to the contrary notwithstanding. This provision is also found in the Tasmania statute (25 Vict. No. 16, 1862), which also provides that the holder of a registered title is entitled, except in cases of fraud, to hold the land subject to the liens excepted by the statute, and gives a right of action for damages against the party guilty of the fraud.

Practically the same provisions are found in Queensland Act of 1861, sections 44, 123, 126; Western Australia Act, 56 Vict. No. 14, 1893, sections 68, 199, 201; New South Wales Act, No. 25, 1900, sections 42, 43, 124, 126; Victoria Act 1890, No. 1149, sections 74, 205, 207.

The Manitoba Real Property Act, 1 and 2 Edward VII, chapter 43, section 71 (2 Manitoba Rev. Stats. 1902, c. 148), makes the certificate conclusive evidence that the person named therein is the owner of the land, subject to <sup>200</sup> the statutory exceptions and the right to show fraud wherein

the registered owner, mortgagee, or encumbrancer has participated or colluded. The act also provides that: "Nothing contained in this act shall take away or affect the jurisdiction of any competent court on the ground of actual fraud, or over contracts for the sale or other disposition of land, or over equitable interests therein": Jones on Torrens System, 337. The Ontario act of 1885 provides that a person who fraudulently procures an entry in the registry is guilty of a felony and "any certificate of title obtained by means of such fraud or falsehood shall be null and void for or against all persons other than a purchaser for valuable consideration without notice": Jones on Torrens System, 143, 144.

The Massachusetts statute (Mass. Rev Laws 1902, c. 128, sec. 37), makes the decree of registration conclusive, "subject, however, to the right of any person deprived of the land or any estate or interest therein by a decree of registration obtained by fraud, to file a petition for review within one year after the entry of the decree, provided no innocent purchaser for value has acquired an interest." This provision also appears in the Hawaiian statute (Rev. Laws 1905, c. 154, sec. 2431) and in substance in the Philippine act (3 Acts Philippine Com. No. 496, sec. 38). In Illinois (Act May 1, 1897 [Laws 1897, p. 141]; Starr & Curtis' Ann. Stats. Supp. 1902, p. 266, c. 30, par. 48) and Oregon (Laws 1901, p. 438; 2 B. & C. Comp., sec. 5432), the registered owner shall, "except in cases of fraud to which he is a party or of the person through whom he claims without valuable consideration paid in good faith," hold the land subject only to such estates as are noted or reserved by the statute. In California (Gen. Laws 1903, p. 1397, Act 4115, sec. 37), it is provided that "In case of fraud any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this act, provided that nothing contained in this section shall affect the title of a registered owner who has taken bona fide, for a valuable consideration or of any person bona fide claiming through or under him."

The Colorado statute (Laws 1893, p. 298, c. 107; 3 Mills' Ann. Stats. Rep. Supp., c. 29) is based on the Minnesota statute, and contains no exception of fraud. For the construction of the provisions relating to fraud in the Australian and New Zealand acts, see *Assets Co. v. Mere Roihi*, [1905]

App. Cas. 176, and numerous cases cited in the Australian Torrens Digest (1893); 1 Hunter on Torrens Title Cases; Hogg on Australian Torrens System, 833 et seq.

(b) These provisions are omitted from the Minnesota statute. It declares that every person securing a title in pursuance of a decree of registration and every subsequent purchaser of registered land who takes a certificate of title for value and in good faith shall hold the same free from all encumbrances except only such estate, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the registrar's office and except (1) lien claims on rights arising or existing under the laws or the constitution of the United States which the statutes of this state cannot require to appear in the record of the registry; (2) any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title; (3) any lease for a period not exceeding three years when there is actual occupation of the premises under the lease; (4) all public highways embraced in the description of the lands included in the certificates shall be deemed to be excluded from the certificates; (5) such right of appeal or right to appeal and contest the application as is allowed by the act.

The act gives a right of appeal to the supreme court within the time and upon the conditions provided for appeals in civil actions, and provides that the decree may within sixty days after it is entered be opened upon the petition of an interested party who had no actual notice of the proceedings. Revised Laws of 1905, section 3394, requires this petition to be filed within sixty days; although the time within which the decree may be set aside and the original certificate of registration declared invalid is, by section 3396, extended to six months. It also provides that any person interested may petition for the correction of omissions or mistakes, but "that this section shall not give the court authority to open the original decree of registration." There is no express provision for vacating a decree obtained by fraud even as against the original wrongdoer and before the rights of innocent parties have attached. It is provided that when an innocent purchaser has acquired rights within the sixty days, the decree shall not be opened, but the "person aggrieved by such decree in any case may pursue his remedy by action of tort against the applicant or any other <sup>211</sup> person for fraud for

procuring the decree." The only other references to fraud are found in the provisions that a person who fraudulently procures the registration of a title is guilty of a felony, and that an action may be brought against the county treasurer for the recovery of damages out of the insurance fund.

4. If the legislature intended to protect a party, who, by fraudulent means, obtains the registration of some other person's land in his name, it should have said so clearly and definitely, and left nothing to implication. It must be presumed that the legislature understood and expected that the courts of equity would remain open to parties who were able to bring themselves within the rules which require the granting of equitable relief. The fact that a statute does not expressly provide that fraud shall invalidate acts authorized to be done under it does not deprive the courts of the general power to protect the rights of parties. The principles which are recognized and enforced in courts of equity underlie our entire system of jurisprudence. They are no more excluded by the failure to insert an exception in the statute than by the failure of parties to insert a similar exception in a private contract. Equity will not allow a party to hold the benefits of a fraudulent transaction although obtained under the forms of law. It is the just and proper pride of our system of equity jurisprudence that fraud vitiates every transaction. However men may surround it by forms, solemn instruments, proceedings conforming to all the details required by the law, or even by the formal judgment of a court, a court of equity will disregard them all if necessary that justice and equity may prevail. It has often been held that the general terms of a statute are subject to implied exceptions founded in the rules of public policy and the maxims of natural justice, so as to avoid absurd and unjust consequences: *Hantzsch v. Massolt*, 61 Minn. 361, 63 N. W. 1069; *State v. Board of Commrs. of Red Lake County*, 67 Minn. 352, 69 N. W. 1083; *Duckstadt v. Board of Co. Commrs. of Polk County*, 69 Minn. 202, 71 N. W. 933; *State v. Rollins*, 80 Minn. 216, 83 N. W. 141; *State v. Barge*, 82 Minn. 256, 84 N. W. 911, 53 L. R. A. 428; *State v. City Council*, 87 Minn. 156, 91 N. W. 298; *United States v. Williams*, 194 U. S. 279, 24 Sup. Ct. Rep. 719, 48 L. ed. 979. For English authorities in which the courts have raised implications when necessary <sup>212</sup> to pre-

vent injustice, see articles in 20 Law Quar. Rev. 399, and 22 Law Quar. Rev. 299.

The rule which authorizes an exception or an evident omission to be read into a statute was applied by this court in *State v. Board of Co. Commrs. of Polk County*, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161, where it was held that the omission from a statute of a provision the absence of which would render the statute unconstitutional would be presumed unintentional. "We are not," said the court, "authorized to indulge in the presumption that the legislature willfully intended by the passage of this act to depart from the settled law of the land." Hence when necessary to prevent a fraud, a court of equity will read an exception into a statute which is expressed in general terms.

By statute, 2 Anne, chapter 20, all unregistered conveyances of land were declared fraudulent and void as against subsequent purchasers for a valuable consideration. The statute did not except purchasers with full knowledge, and the courts of law held that a subsequent deed was void, although the party claiming under it had full knowledge when it was executed of the existence of the prior deed: *Doe v. Allsop*, 5 Barn. & Ald. 142. But the courts of equity, in order "to maintain and extend a righteous and beneficent jurisdiction," ingrafted an exception into the act of parliament. In the language of Lord Mansfield, "Equity says, if the party knew of the unregistered deed, his registered deed shall not set it aside because he has that notice which the act of parliament intended he should have": *Doe v. Routledge*, Cowp. 705. The principle is applied in a line of English cases beginning with *LeNeve v. LeNeve*, Amb. 436, 1 Ves. 64, 2 White & Tudor's Leading cases in Equity, 109, decided under registration acts which contained no exception of fraud or a provision in favor of bona fide purchaser only.

We cannot presume that the legislature in enacting a law, which was intended to benefit the public, and at the same time fully and adequately protect and guard the rights of individuals, intended, by failing to insert an exception in cases of fraud, to deprive the courts of the universally recognized and established jurisdiction to protect the individual from the consequences of fraud. What we have said applies only so long as the land remains registered in the name of the fraudulent wrongdoer. When the rights of an innocent pur-

chaser for value in reliance on the register are involved, other considerations <sup>213</sup> prevail. In the case at bar, the court has found that the registration was obtained by actual fraud, and that the intervener, Deane, was a party to the fraudulent transaction under conditions which supply the moral element which distinguishes actual from so-called legal fraud. We are, therefore, not required to determine whether mere notice of the rights of others constitutes fraud under this statute.

5. An application to vacate the decree, directing the registration of land and the cancellation of the certificate of registration issued thereunder, on the ground that it was obtained by the fraud of the applicant for registration, is governed by general equitable considerations. The Torrens statute makes the provisions of the general statutes relating to the vacating and opening of ordinary judgments inapplicable. A person who seeks equitable relief must, therefore, proceed promptly after notice of the fraud, and is, of course, subject to all the restrictions and exceptions applicable in proceedings in equity. The sixty-day limitation contained in the statute when these transactions occurred (now made six months by Revised Laws of 1905, section 3396) has no application to the case at bar. If the defrauded party is not guilty of laches, he may attack the decree on the ground that it was obtained by fraud, so long as the land stands registered in the name of the party who was guilty of the fraud. No public policy requires that such a title be indefeasible, or that so tempting a reward be offered for the stealing of land under the forms of law. We have given all the assignments of error careful consideration, but do not find it necessary to discuss them in detail.

The order of the trial court is affirmed on both appeals.

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*Proceedings against Unknown Owners for the purpose of quieting title to land are discussed in the note to McClymond v. Noble, 87 Am. St. Rep. 358.*

## WOLF v. EDMONSTON.

[99 Minn. 241, 109 N. W. 233.]

**RECORD OF MORTGAGES—Priority When Instruments Filed at Same Time.**—When two mortgages on the same land, executed to two different mortgagees, are filed for record at the same time by the common agent of the mortgagees, without instructions, the priority of liens is determined presumptively by the order in which the instruments are numbered in the register. (pp. 413, 414.)

Edwin Adams and John M. Hemmingway, for the appellant.

C. A. Nye, for the respondent.

<sup>241</sup> ELLIOTT, J. In an action to determine adverse claims to the northwest quarter and south half of the southwest quarter of section 6, township 139, <sup>242</sup> range 47, in Clay county, the court found that the title to the south half of the southwest quarter is absolute in the plaintiff, Casper Wolf, and that the northwest quarter of said section is owned in common by Casper Wolf and the defendant, John Edmonston. From an order denying a new trial, the plaintiff appealed to this court. It is conceded that Edmonston is the owner of the north half of the southwest quarter, and the appeal involves only the question of the ownership of the northwest quarter of the section. For convenience the northwest quarter will be referred to as tract A, the north half of the southwest quarter as tract B, and the south half of the southwest quarter as tract C.

1. The evidence discloses the following facts:

(a) Tract A in question was acquired by one Moore from the government. March 1, 1881, he mortgaged it to Edward R. Ruggles to secure a loan of nine hundred dollars. By subsequent conveyances the title passed, subject to the mortgage, to John Erickson. The Ruggles mortgage was foreclosed, and the title to the land became absolute in Ruggles, on June 1, 1886. April 27, 1887, Ruggles deeded the land back to Erickson for a consideration of thirteen hundred and eighty-seven dollars. Of this amount three hundred and eighty-seven dollars appears to have been paid in cash, and for the balance Erickson gave to Ruggles a mortgage on the same land.

(b) At this time Erickson also owned tracts B and C, and Ruggles held another mortgage on C. Tract B was free from encumbrance. June 20, 1887, as security for the payment of fifteen hundred dollars, Erickson gave a mortgage to John D. Edmonston on A, B, and C—the entire west half of section 6. The mortgage to Ruggles for one thousand dollars and the mortgage to Edmonston for fifteen hundred dollars were executed on the same day, and were both filed in the office of the register of deeds of Clay county on June 20, 1887, at 11 o'clock A. M. In these transactions Ruggles and Edmonston were represented by Frank J. Burnham. The Ruggles mortgage was by the register of deeds numbered 405, and the Edmonston mortgage 408.

(c) We find, then, that just prior to June 20, 1887, the title to B and C was in John Erickson. Ruggles held the absolute fee-simple title to A, and a mortgage on C, which it is conceded subsequently ripened into a good title. Ruggles deeded A to Erickson. After these mortgages were given, Ruggles then held a mortgage of one thousand dollars <sup>243</sup> on A, which appellant claims was a first lien. Edmonston held a mortgage for fifteen hundred dollars, which admittedly was a first lien on B and a second lien on C, and which respondent Edmonston claims was a lien on A co-ordinate with the Ruggles mortgage for one thousand dollars.

2. Neither mortgage was ever paid. They were both foreclosed and A was bid in by Ruggles at the foreclosure sale of March 17, 1894, for the sum of seventeen hundred and twelve dollars. Edmonston at the sale on June 2, 1894, bid in A, B, and C for the sum of one thousand dollars, leaving a balance of his debt unpaid. There was no redemption from either sale. Edmonston acquired absolute title to B, and entered into possession thereof, and subsequently paid taxes thereon. Ruggles, through another conveyance, acquired title to C, and entered into possession of it, and also of A, upon which he subsequently paid taxes. From Ruggles the land passed through several conveyances to the appellant, Wolf.

3. Was the Ruggles mortgage a first lien, or were the Ruggles and Edmonston mortgages co-ordinate liens, on A? The question of priority of liens is determined by the intention of the common agent of the mortgagees when he filed the instruments for record. The two mortgages were filed by



Burnham, the representative of both mortgagees, at the same time, and there is no evidence to show that he gave any instructions to the register of deeds as to the order in which they should be filed and numbered. Revised Laws of 1905, section 538 (Gen. Stats. 1894, sec. 767), provides that: "Every register shall indorse plainly upon the top of the back, when folded, of each instrument received by him for record or filing as soon as received, a number consecutive to the number affixed to the instrument next previously received, and shall enter such number as a part of the entry relating to such instrument in all the indexes kept in his office, and on the margin of the record of the instrument, and such number shall be prima facie evidence of priority of registration. If more than one instrument shall be received at the same time, by mail or other inclosure, the register shall affix such number in the order directed by the sender, and if no direction be given, then in the order in which the instruments actually come to his hand in opening the inclosures."

<sup>244</sup> In the absence of any showing to the contrary, we must therefore hold that these mortgages took priority in the order in which they were numbered: *Connecticut Mut. Life Ins. Co. v. King*, 80 Minn. 76, 82 N. W. 1103. We start, then, with the presumption that the Ruggles mortgage was a first lien on the tract in question, and must determine whether the record contains evidence sufficient to sustain the finding that Burnham intended that the two mortgages should be co-ordinate. Neither Ruggles nor Edmonston was ever a resident of Minnesota. They were both represented by Frank J. Burnham, who it is admitted was the general agent, fully authorized by both to make loans, to reinvest money in his hands, pass upon the sufficiency of securities and titles, collect interest, pay taxes, and generally supervise their loaning interests and do everything necessary and incidental thereto. He occupied the same relation to both parties. Respondent infers that Burnham intended that the mortgages should be co-ordinate from the fact that they were executed at the same time by the common agent; that each party took his mortgage with constructive knowledge of the rights of the other; that the Ruggles mortgage was no more a purchase mortgage than was that of Edmonston, because a part of the proceeds of the Edmonston loan was used to pay judgment liens already on the land; that the Ruggles mortgage

was not a renewal of the old mortgage of 1881; and from other circumstances not necessary to enumerate.

We do not think the evidence is sufficient to overthrow the statutory presumption. It points rather to the inference that Burnham intended that the Ruggles mortgage should be a first lien, and thus supports the statutory inference. Burnham owed an equal duty to Ruggles and Edmonston. It will be presumed that he did not intend to give one of his investing clients an unfair advantage over the other, or sacrifice the interests of the one for the benefit of the other. When the question of making these loans presented itself to him, Ruggles held the absolute title to A. He had thirteen hundred and seventy-eight dollars invested in the land. He had also a first lien on C. Edmonston was not interested in either tract. It may be assumed that Burnham wished to readjust matters and give Erickson another chance. To do this required some cash, and, as he had money belonging to Edmonston ready for investment, he decided to use it in this way. It does not appear that he intended <sup>245</sup> to put Ruggles in a worse position than he was already in. Erickson had lost A, and was having difficulty in paying what was due on C. He held B free from encumbrance. Burnham loaned Erickson fifteen hundred dollars of Edmonston's money. The only land which Erickson had free from encumbrance was B, and upon this the Edmonston mortgage was made a first lien. It was the primary security, but as additional security the mortgage was made to cover A and C also—the entire west half of the section. It would be unreasonable to infer that he intended to deprive Ruggles of the security of the land which he already owned in fee and which he was selling back to Erickson. The value of the latter's equity in A was increased by the payment of three hundred and eighty-seven dollars in cash, and Edmonston's second lien was increased in value to this extent. The Ruggles mortgage was to all intents and purposes a purchase-money mortgage. By co-ordinating the two mortgages, Ruggles, without any apparent reason or benefit, would have been deprived of three-fifths of his security. We find nothing in the evidence that leads us to the conclusion that Burnham intended such a result. His subsequent actions show that he understood that Ruggles had a first mortgage on A. He had personally guaranteed the payment of the mortgage debts, and yet, when

the mortgages were foreclosed, he bid in the entire half section for Edmonston for one thousand dollars, leaving himself personally liable for the balance. The inference is that he understood that Edmonston was purchasing subject to the Ruggles mortgage. After the expiration of the time for redemption, Burnham took charge of the lands for his clients, and credited A to Ruggles and B to Edmonston, and thereafter paid the taxes upon each tract in the name of the respective owners. He also acted as Ruggles' agent in selling the quarter section in question. There are many other circumstances which point to the same conclusion. The weight of the evidence supports, instead of overthrows, the statutory presumption, and it follows that the court was in error in holding that the appellant and respondent are respectively the owners of equal undivided interests in the northwest quarter of section 6. The respondent Edmonston has no interest in said land.

The order from which the appeal was taken is therefore reversed, and a new trial granted.

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*If Two Instruments are Executed the Same Day and filed for record at substantially the same time, and the same person is the beneficiary in both, it is not material which is first recorded or filed for record: Hudson Commission Co. v. Glencoe Sand etc. Co., 140 Mo. 103, 62 Am. St. Rep. 722.*

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## HARPER v. ST. PAUL CITY RAILWAY COMPANY.

[99 Minn. 253, 109 N. W. 227.]

**STREET RAILWAYS—Care Toward Dogs on Track.**—When dogs are fighting on a street railway track, apparently oblivious to an approaching car, the motorman, upon discovering their peril, should take reasonable precautions, by giving signals or checking the speed of the car, to avoid injury to them. If he fails to exercise such care, the railway company is answerable for injuries sustained by the animals. (p. 417.)

Munn & Thygeson, for the appellant.

J. R. Blackwell and J. W. Pinch, for the respondent.

**253 LEWIS, J.** Verdict in favor of respondent for fifty dollars damages for the killing of an English setter by appellant company. Two witnesses on behalf of respondent testified that they were driving in a southerly direction on the

west side of the street-car tracks on Snelling avenue, in the city of St. Paul, and noticed the two dogs fighting between the rails of the east track, and that they remained there for several minutes in fierce combat and until the north-bound car struck them; that the car was running about twelve or fifteen miles an hour, and that the motorneer made no attempt to check the speed of the car and did not blow any whistle or ring any bell. The country was level for a distance of nearly three hundred feet, and, if the testimony of these witnesses be accepted as true, then, if in the exercise of his usual duties, the motorman must have seen the dogs on the track. This evidence was strongly denied by the motorman and other witnesses of appellant, but was credited as true by the trial court and jury, and we are bound by their decision.

254 The case was submitted to the jury upon the proposition of law that, if the motorneer saw the dogs on the track, he was required to use such care as a reasonably prudent person would exercise under like circumstances to avoid collision with them, and if it appeared that the car was equipped with the usual signals, and the dog was on the track, and the motorneer saw him, then the jury should determine whether the motorman did in fact give such signals as reasonable prudence would dictate under the circumstances. As to the instruction, it is very clear that the trial court had no intention of limiting the exercise of reasonable care to the usual signals, but also had in mind the control of the speed of the car by the motorneer, and it was quite proper to mention the use of signals as bearing upon the degree of care required. It might be that the ringing of the bell alone, under such circumstances, would not have attracted the attention of the animals; but it was not error to refer to the usual manner of giving warning of the approach of the car, to be considered upon the general question submitted.

In *Smith v. St. Paul City Ry. Co.*, 79 Minn. 254, 82 N. W. 577, it was stated that a street-car company was not required to stop its cars, when running at a legal or reasonable rate of speed, to avoid collisions with dogs; that ordinarily dogs may be presumed to take care of themselves, and the motorman may act on such presumption. This was a correct statement of law with reference to the facts of that case, and we adhere to that opinion, believing it to be the true doctrine

that railways should not be held to the same degree of care with respect to dogs as to other animals running at large, such as cattle and horses.

As to such animals the rule is stated in *Mooers v. Northern Pacific R. Co.*, 69 Minn. 90, 71 N. W. 905, where it was held that locomotive engineers are not bound to keep a lookout for animals trespassing on the track, nor to presume they will be there, but, having notice of their presence and that they are liable to injury, are bound to use reasonable care, at least, to avoid injury. In that case some horses escaped from a pasture and were running on the railroad track ahead of an approaching train, and the engineer ran them down without making any effort to avoid the collision. We apprehend that the same rule should not be applied in the case of dogs, owing to their superior intelligence, agility, and instinctive ability to get out of danger. <sup>255</sup> Consequently persons in charge of street-cars should not be required to slow down merely because dogs may be running in the vicinity of, along, or across the tracks. Under such circumstances, motorneers may well assume that dogs will get out of the way. However, under the laws of this state dogs are property, and, whether rightfully or wrongfully upon the tracks, cannot be ignored when discovered in a position of danger. In this instance the dogs were engaged in a fierce fight, and their attention was not likely to be attracted by the noise alone of the approaching car. If the motorman was aware of their situation, then he should have taken reasonable precaution to avoid injury to them. There is no hardship in such a rule, and it has been generally applied, or recognized, in this class of cases: *Citizens' v. Dew*, 100 Tenn. 317, 66 Am. St. Rep. 754, 45 S. W. 790, 40 L. R. A. 518; *Meisch v. Rochester*, 72 Hun, 604, 25 N. Y. Supp. 244; *Marshall v. Dallas St. Ry. Co.* (Tex. Civ. App.), 73 S. W. 63; *Moore v. Charlotte Electric etc. Co.*, 136 N. C. 554, 48 S. E. 822, 67 L. R. A. 470; *Jones v. Bond* (C. C.), 40 Fed. 281; *St. Louis & T. Ry. Co. v. Hawks*, 78 Tex. 300, 14 S. W. 691, 11 L. R. A. 383; *Hamby v. Samson*, 105 Iowa, 112, 67 Am. St. Rep. 285, 74 N. W. 918, 40 L. R. A. 508.

Order affirmed.

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*The Principal Case* is supported by *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 66 Am. St. Rep. 754. There is no doubt as to the general rule that the owner of a dog may maintain an action for  
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damages against a railway company for negligently killing or injuring the animal in the operation of its cars: Louisville etc. R. R. Co. v. Fitzpatrick, 129 Ala. 322, 87 Am. St. Rep. 64; Chapman v. Decrow, 93 Mo. 378, 74 Am. St. Rep. 357; Salley v. Manchester etc. R. R. Co., 54 S. C. 481, 71 Am. St. Rep. 810; Hodges v. Causey, 77 Miss. 353, 78 Am. St. Rep. 525; note to Hamby v. Samson, 67 Am. St. Rep. 288.

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### MURPHY v. RENNER.

[99 Minn. 348, 109 N. W. 593.]

**HOMESTEAD—Conveyance by Husband Alone.**—A conveyance of a homestead by a married man without the signature of his wife is void, although she has abandoned him and her home and is living an adulterous life. (p. 422.)

John Lind, A. V. Rieke and W. A. McDowell, for the appellants.

Daly & Barnard, for the respondent.

<sup>348</sup> **START, C. J.** This action was brought in the district court of the county of Renville to recover from the defendants the possession of eighty acres of land. The trial court directed a verdict for the plaintiff. The defendants made a motion for judgment notwithstanding the verdict, or for a new trial. The court made its order denying the motion for judgment, and granting the motion for a new trial. The defendants appealed from the order: 'If the evidence is practically conclusive that the plaintiff has no interest whatever in the land, then the order denying defendants' motion for judgment was erroneous; otherwise not.

There is but little conflict in the evidence, and by it, with the admissions in the pleadings and the concession, for the purpose of this appeal, in the defendants' brief to the effect that John and Bridget Murphy were husband and wife, the following facts are established, namely: The defendants are husband and wife, and in possession of the land. On April 2, 1884, title to the land was in the state of Minnesota, and on that day it executed to John Murphy certain certificates whereby it agreed to convey the land to him upon his making payment of the balance of the purchase price therein stipulated. He <sup>349</sup> was then a married man, Bridget Murphy being his wife, and with her he entered into possession of the land and they lived thereon and it became and

was their homestead. Some two years thereafter, and in 1886, she abandoned her home, her husband, and their five minor children then living on the land, without any just cause. She went to Duluth and other places without any intention of ever returning to her husband and home. In 1889 she went through the form of a marriage ceremony with another man by the name of William Henry Whitney. Thereafter they lived together as husband and wife for several years. While so living together she gave birth to a child of whom Whitney was the father. She and this spurious husband purchased a house in Duluth in which they were then living and held it for two years. How long they lived together does not clearly appear from the record, but it is clear that they so lived together until the year 1894. Some time thereafter, and before John Murphy's death, she and Whitney were separated, and she assumed a new role, and went to live with a man by the name of Louis Sheppo, and was known as Mrs. Sheppo. She was so living with him at the time John Murphy died. Some seven years after she so abandoned her home and husband, and on October 6, 1893, John Murphy, who had continued to reside on the land as his homestead ever since such abandonment, assigned the state certificates so held by him, and quitclaimed the land for a valuable consideration to the grantors of the defendants. His wife never signed or executed the instruments whereby he purported to assign and convey his interest in the land, but in one of them he described himself as a widower, and in another one as an unmarried man. The grantees of John Murphy for a valuable consideration purported to convey the land to the defendant, Emelie Renner, and she and her husband thereupon entered into possession of the land. John Murphy died intestate July 29, 1904, leaving him surviving his wife, Bridget Murphy, four sons, one of whom is the plaintiff, and one daughter. The plaintiff has acquired by proper conveyances the interest in the land, if any, of his mother, sister and brothers.

It is the contention of the plaintiff that the assignment and deed whereby John Murphy attempted to convey his interest in the land to the defendant's grantors was void because it was his homestead, and his wife did not sign.

<sup>350</sup> On the other hand, the defendants claim that while the land was occupied by John Murphy as a homestead, yet

his wife, by her conduct as disclosed by the record, has estopped herself from asserting any homestead rights in the land, and has forfeited all right thereto.

If this were a case where Bridget Murphy was claiming homestead rights in the land as against the children of herself and John Murphy, there is ample authority to sustain the proposition that she would be estopped by her conduct from asserting such homestead rights against them: *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. Rep. 623, 9 S. W. 361; *Freeman v. Freeman*, 111 Tenn. 151, 76 S. W. 825; *Cockrell v. Curtis*, 83 Tex. 105, 18 S. W. 436; *Farwell B. etc. Co. v. McKenna*, 86 Mich. 283, 48 N. W. 959; *Dickman v. Birkhauser*, 16 Neb. 686, 21 N. W. 396.

The question here to be determined, however, is not whether Bridget Murphy, or those claiming under her, have any homestead rights to the land, for it ceased to be the homestead of her husband some years before his death, for, after he attempted to convey it he removed therefrom and abandoned it as a homestead. The sole question to be decided is whether the deed of John Murphy was void at the time he made it for the reason that he was then a married man, the land his homestead, and his wife did not sign the deed. The hardship of this particular case must not be permitted to obscure the real question, for, if the deed was void under the facts in this case, then no title passed by the deed, John Murphy died seised of the land, and upon his death the title thereto vested in his heirs, his children, and widow. The plaintiff, one of the heirs, claims the land as heir, and as the grantee of the other heirs and his mother. Our statute, for a wise purpose, forbids the alienation of the homestead by the owner, if a married man, without the signature of his wife, and declares that no such alienation shall be valid without her signature: Gen. Stats. 1894, sec. 5522; Rev. Laws 1905, sec. 3456. This statute has been often construed by this court, and we invariably have held that alienation of the homestead, except to secure the purchase price thereof, by a married man without the signature of his wife is void for all purposes, not simply voidable: *Barton v. Drake*, 21 Minn. 299; *Conway v. Elgin*, 83 Minn. 469, 38 N. W. 370; *Law v. Butler*, 44 Minn. 482, 47 N. W. 53, 9 L. R. A. 856; *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817. Nor is a conveyance by the husband without his wife's signature



<sup>351</sup> purporting to convey the homestead rendered valid by the fact that the premises subsequently lose their character as a homestead: *Alt v. Banholzer*, 39 Minn. 511, 12 Am. St. Rep. 681, 40 N. W. 830.

The attempted conveyance by John Murphy in this case was made while he was occupying the land as a homestead with his children; hence, it was absolutely void without the signature of his wife, unless the fact that his wife at that time had willfully deserted him, and was then leading an adulterous life, in some way affects the question of its validity. Upon principle, it is difficult to see how such fact can be read into the statute as an exception. The statute specifically and absolutely provides how a homestead must be conveyed, if at all, and declares that no conveyance thereof by a married man shall be valid without the signature of the wife. The homestead law is not alone for the benefit of the husband, or for the wife, but for their children as well, and the joint act of both is essential to a valid conveyance of it, each having, in legal effect, the power to veto any such conveyance by refusing to sign it. A wife may have wrongfully abandoned her husband and home and yet be desirous of having the homestead kept for her children.

In the case of *Lies v. De Diablar*, 12 Cal. 327, the husband was the owner of a lot which was occupied by him, his wife, and two children as a homestead. She eloped from her husband, and lived an adulterous life. After she had so abandoned her husband and home he gave a mortgage on his homestead which was not signed by her. It was held that the mortgage was void: See, also, *Flege v. Garvey*, 47 Cal. 371, and *Gleason v. Spray*, 81 Cal. 217, 15 Am. St. Rep. 47, 22 Pac. 551.

In the case of *Herron v. Knapp etc. Co.*, 72 Wis. 553, 40 N. W. 149, the husband owned, and with his wife occupied, the land as a homestead. She voluntarily left him and her home, and continued to live separate and apart from him until his death. After she left him he executed, without the signature of his wife, a mortgage on the land for food and the necessaries of life. After his death, in an action by his son to set aside the mortgage and the foreclosure thereof, it was held that the mortgage was void because it was not signed by the wife. Anent the abandonment of her husband and home by the wife, the court said: "Were we to say the hus-

band could execute a valid mortgage on the homestead without his wife's signature because she was living apart <sup>352</sup> from him, we should create an exception where the legislature has made none." We hold upon principle and authority that an attempted conveyance by deed, mortgage, or otherwise of his homestead by a married man without his wife's signature is void, although at the time she may have abandoned him and her home, and may be living at an adulterous life.

It follows in this case that John Murphy died seised of the land in question and that the order granting a new trial should be affirmed.

So ordered.

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*The Effect of a Conveyance of a Homestead by one only of the spouses is considered in the note to Jerdee v. Furbush, 95 Am. St. Rep. 939. The general rule is, that a conveyance of a homestead by the husband by a deed in which his wife does not join is void: Bolen v. Lilly, 85 Miss. 344, 107 Am. St. Rep. 291; Roberson v. Tippie, 209 Ill. 38, 101 Am. St. Rep. 217; Adams v. Gilbert, 67 Kan. 273, 100 Am. St. Rep. 456.*

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## COTTON v. WILLMAR & SIOUX FALLS RAILWAY COMPANY.

[99 Minn. 366, 109 N. W. 835.]

### RAILROAD CROSSING—Evidence of Absence of Signals—

When it is alleged that the bell on a locomotive was not rung as the train approached a crossing, the testimony of witnesses, who were present and listening for signals, that they did not hear it ring, is sufficient to take the issue to the jury, although other witnesses declare that the bell did ring. (p. 426.)

### NEGLIGENCE of Driver not Imputed to Passenger.—

Where a person employs a livery team with a driver to carry him to a specified place, the relation of master and servant does not exist between the passenger and the driver, neither are they engaged in a joint enterprise. Therefore the negligence of the driver in driving over a railway track in front of an approaching train is not imputable to the passenger. The latter, however, is required to exercise reasonable care for his own safety. (p. 430.)

W. R. Begg, C. H. Winsor and W. F. McNaughton, for the appellant.

Janes & Janes, for the respondent.

<sup>367</sup> ELLIOTT, J. On the evening of December 21, 1905, the respondent, Cotton, engaged a livery team and driver to take him from Bell Rapids, South Dakota, to Jasper, Minnesota. The vehicle was a common, single-seated two-horse buggy, and the driver was a young man about nineteen years of age who had had experience and was familiar with the route over which they were to pass. By the time they reached the village of Jasper, it was dark, and the lights were burning in the streets and houses. The weather was cool, the top of the buggy up, and the side and back curtains were drawn. Both the respondent and the driver wore heavy coats with the collars turned up, but not in such manner as to interfere materially with their hearing. Wall street, upon which they entered the village, crosses the appellant's railway track at a point about seven rods east of where the street crosses a bridge or culvert. The street runs east and west, and the railway track extends practically north and south. The depot building is on the west side of the track and just south of the street crossing. When the team was between fifty and seventy rods from the track both the respondent and the driver heard the whistle of a locomotive. They continued on at a brisk pace until they crossed the bridge, when the team was brought to a walk, and the respondent leaned forward and looked and listened for the approaching train. At the same time, the driver, who sat on the respondent's right, toward the south, also looked out and listened for the train. It does not appear that the driver saw anything or made any remark, although the engine of the train must have then been behind, and concealed from view by, the station building, and the train extending toward the south, where it would have been visible in the daytime. The respondent, however, saw a light some six hundred or seven hundred feet up the track to the northward, which he assumed to be the headlight of a locomotive, and said, "There is the headlight." Assuming, apparently, that they had ample time to cross the track before the train would come that distance, both parties settled back in the seat, the driver touched the horses with the whip, and drove rapidly upon the track. They were struck by the train coming from the south, and the respondent sustained injuries for which he recovered a verdict for five thousand dollars. The appeal is from an order denying <sup>368</sup> a motion by the

railway company for judgment notwithstanding the verdict or for a new trial.

The appellant contends that the evidence was not sufficient to establish negligence on the part of the railway company, but showed conclusively that the accident was caused by the negligence of the respondent in failing to use the proper care for his own safety. The complaint alleges as negligence (a) that the defendant ran the train over the street at a dangerous and unusual rate of speed; (b) failed to provide the engine with a proper headlight; (c) neglected to keep a watchman at the crossing; and (d) failed to give any signal of the approach of the train. These claims were all submitted to the jury, but upon this appeal it is conceded that, if the railway company was negligent, it was in failing to ring the bell as the train approached the crossing. The appellant contends (1) that there was no substantial evidence tending to show that the bell was not rung; (2) that the evidence showed that the respondent personally participated in the acts and controlled the driver in the management of the team; and was thus guilty of contributory negligence; (3) that the court erroneously charged the jury as to the burden of proof and as to the relation between the driver and the respondent; and (4) that the verdict was excessive.

1. The allegation being that the bell was not rung, it was competent to prove the negative fact by the testimony of competent witnesses who were so situated that they might, and probably would, have heard the sound had the bell been rung. The plaintiff alleged, and was required to prove, that the bell did not ring. The fact in issue was whether at a certain time and place certain sounds were produced. Silence is as much a fact as sound, and the proof of one disproves the other. If a witness hear a sound the necessary implication is that he was where he could hear the sound, but the fact that a witness did not hear a sound carries with it no such implication. Therefore, when it is sought to prove the nonexistence of sound by the testimony of witnesses, the conditions essential to the competency of the evidence must be supplied. The probative value to be given to the fact that a witness did not hear the sound depends upon the condition of his senses, his proximity to the place, the degree of attention, and other such circumstances which render it more or less probable that, if <sup>369</sup> the sound had been made,

the witness would have heard it. Hence the mere statement of a witness that he did not hear a bell ring is valueless as evidence, unless it further appears that he was able to hear and was in a position and under conditions where he would probably have heard the sound had it been made. The degree of attention will affect the value of the evidence, but the fact that the witness was not giving his direct attention at the time for the purpose of learning whether signals were given will not destroy the value of the evidence if he was present at the crossing, and conscious, and in possession of his ordinary senses, and testifies positively that he heard no signal. The testimony of a witness that he did not hear a bell rung is thus, of itself, as against direct and positive testimony of another that the bell did ring, no evidence that it did not ring, but, taken in connection with evidence, showing that the witness could and probably would have heard it, had it been rung, and that he was listening to hear it ring, is evidence that it did not ring. The position and situation of the witnesses, the attention they were giving, and their credibility, and the weight of the evidence are questions for the jury: *Moran v. Eastern Ry. Co. of Minn.*, 48 Minn. 46, 50 N. W. 930; *Green v. Eastern Ry. Co. of Minn.*, 52 Minn. 79, 53 N. W. 808; *Peterson v. Minneapolis St. Ry. Co.*, 90 Minn. 52, 95 N. W. 751; *Tennessee etc. R. R. Co. v. Hansford*, 125 Ala. 349, 82 Am. St. Rep. 241, 28 South. 45; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Johanson v. Boston & M. R. Co.*, 153 Mass. 57, 26 N. E. 426; *Walsh v. Boston & M. R. Co.*, 171 Mass. 52, 50 N. E. 453; *Marcott v. Marquette H. & O. R. Co.*, 49 Mich. 99, 13 N. W. 374; *McLean v. Erie R. Co.*, 69 N. J. L. 57, 54 Atl. 238, 70 N. J. L. 337, 57 Atl. 1132; *Goodwin v. Central (N. J. Eq.)*, 64 Atl. 134; *Northern C. R. Co. v. State*, 100 Md. 404, 108 Am. St. Rep. 439, 60 Atl. 19; *Purnell v. Raleigh & G. R. Co.*, 122 N. C. 832, 29 S. E. 953; *Reed v. Chicago etc. Ry. Co.*, 74 Iowa, 188, 37 N. W. 149; *Atchison etc. R. Co. v. Feehan*, 149 Ill. 202, 36 N. E. 1036; *Chicago etc. R. Co. v. Eganolf*, 112 Ill. App. 323; *Chicago etc. Ry. Co. v. Pulliam*, 111 Ill. App. 305; *McDuffie v. Lake Shore etc. Ry. Co.*, 98 Mich. 356, 57 N. W. 248; *Murray v. Missouri P. Ry. Co.*, 101 Mo. 236, 20 Am. St. Rep. 601, 13 S. W. 817. Such evidence, while negative in form, is affirmative in substance: *Grabill v. Ren*, 110 Ill. App. 587. The cases cited by appellant are not inconsistent with this rule, as a careful examination of

the facts of each case will disclose that some essential element was absent. In *Bohan v. Milwaukee etc. Ry. Co.*, 61 Wis. 370 391, 21 N. W. 241, and *Tully v. Fitchburg, R. Co.*, 134 Mass. 499, stress is laid upon the inadequacy of such evidence.

The substance of these decisions is that it is not enough for a witness to say that he does not remember having heard a bell ring. "Courts have often been asked," says Wigmore, "to exclude testimony based on what may be called negative knowledge, i. e., testimony that a fact did not occur, founded upon the witness' failure to hear or see a fact which he would supposedly have heard or seen if it had occurred. But there is no inherent weakness in this kind of knowledge. It rests on the same data of the senses. It may even sometimes be stronger than affirmative impressions. The only requirement is that the witness should have been so situated that in the ordinary course of events he would have heard or seen the fact had it occurred": 1 Wigmore on Evidence, sec. 664; 2 Elliott on Evidence, sec. 969; 6 Thompson on Negligence, sec. 7865; 5 Current Law, 1369.

The evidence was sufficient to justify the court in submitting the question to the jury. The engineer and fireman, witnesses for the defendant, testified that the bell was rung in the usual manner as the locomotive approached the street crossing. The defendant's witness Larson, who stood on the crossing, saw the team approaching, appreciated the danger of an accident, and shouted to the occupants of the buggy to stop, was not asked with reference to the ringing of the bell, although he testified that he heard the whistle blow and saw the headlight of the locomotive. The respondent and the driver testified that they did not hear the bell ring. There was evidence that they were within a few rods of the approaching engine, the night was dark and frosty; there was but little wind blowing; they were listening for the approach of an expected train; their minds were in a condition under which it is more than probable that they would have heard the ringing of a bell on an engine coming from the south, although they understood that the train was approaching from the north; they were conscious; were in the exercise of their ordinary senses; and their sense of hearing was not materially affected by their coat collars.

Under all the circumstances the jury might reasonably infer that they would have heard the bell if it had been rung.

2. While the appellant does not contend that the doctrine of imputed negligence applies, the argument would lead to the imposition <sup>371</sup> of a duty upon the passenger in excess of that which has been approved by this court. In *Thorogood v. Bryan*, 8 Com. B. 115, it was held that a passenger upon the vehicle of a common carrier who sustains an injury, which is the result of the concurrent negligence of the person in charge, of such vehicle and a third person, is so identified with the driver as to be chargeable with his negligence in an action against the latter. The case was followed with some modifications by a few American courts, notably Wisconsin and Michigan: *Prideaux v. City of Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558; *Olson v. Town of Luck*, 103 Wis. 33, 79 N. W. 29; *Mullen v. City of Owosso*, 100 Mich. 103, 43 Am. St. Rep. 436, 58 N. W. 663, 23 L. R. A. 693. In *Follman v. City of Mankoto*, 35 Minn. 522, 59 Am. St. Rep. 340, 29 N. W. 317, this court refused to accept the doctrine of imputed negligence. It there appeared that the plaintiff was riding in a private carriage at the invitation of the owner and was injured by the concurrent negligence of the driver and a third person. The theory of the identity of the passenger and the driver upon which the English case rested, had it been adopted, would have prevented a recovery upon the facts, but it was held that as the plaintiff was without fault and had no authority over the driver, she could recover. Mr. Justice Dickinson noted the fact that *Thorogood v. Bryan*, 8 Com. B. 115, had been subjected to criticism in England, and in the following year, after very elaborate consideration, the doctrine was repudiated by the court of appeals, in the case of *The Bernina*, [1887] L. R. 12 P. D. 58. The American courts have very generally declined to approve the doctrine of *Thorogood v. Bryan*, 8 Com. B. 115, but have not been able to agree upon the extent of the duty which rests upon a person who rides in a vehicle which is driven by a person over whom he has no direct control: *Bennett v. New Jersey R. & T. Co.*, 36 N. J. L. 225, 13 Am. Rep. 435; *New York etc. R. Co. v. Steinbrenner*, 47 N. J. L. 161, 54 Am. Rep. 126; *Becke v. Missouri Pac. Ry. Co.*, 102 Mo. 544, 13 S. W. 1053, 9 L. R. A. 157.

One group of cases charges the passenger with the absolute duty of keeping a lookout for his own safety, and does not permit him to trust to the care of the driver, while another allows him to rely upon a driver, whom he believes to be careful and competent, without being subject to the implication of negligence: 2 Thompson on Negligence, sec. 1621, and cases there cited. But the rule which has met with general approval in the more recent cases makes the passenger responsible only for his <sup>372</sup> personal negligence, and leaves it to the jury to determine whether, under the circumstances, he was justified in trusting his safety to the care of the driver and not looking and listening for himself. The negligence of the driver is thus not imputed to the guest or passenger, but the circumstances may be such as to make it the duty of the passenger to look and listen and attempt to control the driver for his own protection. The passenger is thus held responsible for his own negligence, but not for the negligence of the driver. He must exercise due care and caution, and, if his negligence contributes approximately to the accident, he cannot recover damages: West Chicago St. Ry. Co. v. Piper, 165 Ill. 325, 46 N. E. 186; Missouri K. & T. Ry. Co. v. Bussey, 66 Kan. 735, 71 Pac. 261; Whitman v. Fisher, 98 Me. 575, 57 Atl. 895; Indianapolis St. Ry. Co. v. Johnson, 163 Ind. 518, 72 N. E. 571; and cases collected in a note to Colorado v. Thomas, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681; 3 Am. & Eng. Ann. Cas. 703.

In Illinois C. R. Co. v. McLeod, 78 Miss. 334, 84 Am. St. Rep. 630, 29 South. 76, 52 L. R. A. 954, it was said that, where the danger is apparent the passenger is chargeable with the duty of taking some action to control the conduct of the driver. In Township of Crescent v. Anderson, 114 Pa. 643, 60 Am. St. Rep. 367, 8 Atl. 379, and Dean v. Pennsylvania R. Co., 129 Pa. 514, 15 Am. St. Rep. 733, 18 Atl. 718, 6 L. R. A. 143, it was held that where the danger is obvious or the passenger has knowledge of its existence, he is chargeable with negligence. In Dryden v. Pennsylvania R. Co., 211 Pa. 620, 61 Atl. 249, it was said that the immunity of the passenger "is not absolute to the extent of excusing reasonable caution in the face of patent danger." A passenger certainly would be negligent if he relied on a driver who was known to be intoxicated or otherwise incompetent: Roach v. Western & N. R. Co., 93 Ga. 785, 21 S. E. 67; Meenagh v. Buckmaster, 26 App. Div. 451, 50 N. Y. Supp.



85. Many other cases might be cited to illustrate the rule that a guest or passenger riding in a vehicle with a driver, over whose conduct he has no rightful control, is required, nevertheless, to exercise reasonable care for his own safety.

In *Howe v. Minneapolis etc. Ry. Co.*, 62 Minn. 71, 54 Am. St. Rep. 616, 64 N. W. 102, 30 L. R. A. 684, the court said: "We think that it would hardly occur to a man of ordinary prudence when riding as a passenger with a competent driver, who he had no reason to suppose was neglecting his duty, that he was required when <sup>373</sup> approaching a railroad crossing to exercise the same degree of vigilance in looking and listening for approaching trains that he would if he himself had the control and management of the team, and our conclusion is that a court cannot hold, as a matter of law, that a passenger having no control over the team or its management is guilty of negligence merely because he does not exercise the same degree of vigilance in looking and listening on approaching a railway crossing which is required of the one having the control and management of the team. It is a matter of common knowledge that, under ordinary circumstances, passengers do largely rely on the driver, who has exclusive control and management of the team, exercising the required care when approaching a railway crossing, and we do not think that the courts are justified in adopting a hard-and-fast rule that they are guilty of negligence in doing so. Every case must depend largely upon its own particular facts." This rule which makes the negligence of the passenger, under all the circumstances, a question for the jury was applied in *Johnson v. St. Paul City Ry. Co.*, 67 Minn. 260, 60 N. W. 900, 36 L. R. A. 586; *Finley v. Chicago etc. Ry. Co.*, 71 Minn. 471, 74 N. W. 174; *Wosika v. St. Paul City Ry. Co.*, 80 Minn. 364, 83 N. W. 386; *Lammers v. Great Northern Ry. Co.*, 82 Minn. 120, 84 N. W. 728; *Cunningham v. City of Thief River Falls*, 84 Minn. 21, 86 N. W. 763. The question of the respondent's contributory negligence was thus for the jury to determine, unless the evidence was such as to require the court to determine it as a question of law.

3. The appellant contends that the court erroneously instructed the jury as to the relation which existed between the respondent and the driver. The rule that the driver's

negligence is not imputable to a person who is being carried in a vehicle is only applicable in cases where the relation of master and servant or principal and agent does not exist. The negligence of a person's own driver is imputable to him: *Markowitz v. Metropolitan*, 186 Mo. 350, 85 S. W. 351, 69 L. R. A. 389; *Read v. City & S. Ry. Co.*, 115 Ga. 366, 41 S. E. 629. So where the parties are engaged in a joint enterprise or in a common employment, the negligence of one is imputable to all: *Boyden v. Fitchburg R. Co.*, 72 Vt. 89, 47 Atl. 409; *Donnelly v. Brooklyn*, 109 N. Y. 16, 15 N. E. 733. In *Cunningham v. City of Thief River Falls*, 84 Minn. 21, 86 N. W. 763, the court said: "Parties cannot be said to be engaged in a joint <sup>374</sup> enterprise within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice, and right to be heard in its control and management."

These parties were not engaged in a joint enterprise, neither did the relation of principal and agent or master and servant exist between them. The respondent had contracted to be conveyed to Jasper for an agreed consideration. He was a passenger in a quasi public conveyance, and had no rightful control over the actions of the driver. Neither party had the right to direct the movements of the other. The respondent asked the liveryman at Bell Rapids what he would charge to take him to Jasper, and was informed that he would do it for two dollars and fifty cents. Later in the day he telephoned for the team and the liveryman sent it with Nelson as driver. The driver was the servant of the liveryman. This is all the evidence as to the contract of hiring, and it fails to show any relationship which would charge the respondent with responsibility for the actions of the driver. In *Randolph v. O'Riordon*, 155 Mass. 31, 29 N. E. 583, it was held that the relationship of master and servant was not created by a mere contract for conveyance in a livery team. The court said: "Whether the hack and driver were hired at a public stand or of a private person could make no difference, nor whether the party furnishing them was engaged in the business of a common carrier of passengers or not": See, also, *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. Rep. 391, 29 L. ed. 652; *Lewis v. Long Island R. Co.*, 162 N. Y. 52, 56 N. E. 548;

Sluder v. St. Louis, 189 Mo. 107, 139, 88 S. W. 648, 5 L. R. A., N. S., 186, and Quarman v. Burnett, 6 Mees. & W. 499.

A careful examination of the evidence satisfies us that the question of respondent's contributory negligence was under all the circumstances for the jury to determine. It differs very materially from the case of Shindelus v. St. Paul City Ry. Co., 80 Minn. 364, 83 N. W. 386, in which it appeared that the plaintiff neither looked, listened, nor took any precautions whatever for his own protection. It is claimed that the respondent actively participated in the negligence of the driver. The respondent did not assume to control the actions of the <sup>375</sup> driver unless it was by the statement or exclamation with reference to the headlight. It is evident that this statement did not cause the driver to relax his vigilance or induce him to do anything that he would not otherwise have done. He had himself leaned forward and looked in the direction from which the train was approaching. The respondent's statement may have prevented him from looking to the north, but this was of no consequence as the train was not coming from that direction. There was evidence tending to show that the respondent looked and listened for an approaching train; that he saw a light which he erroneously assumed to be the headlight of an approaching locomotive; that he looked and listened for the approaching train; that, had the light seen by him been the headlight, there would have been ample time to cross the track without injury; that he observed the driver looking and listening, and there was nothing to show that he had any reason for doubting that the driver was an ordinarily cautious and competent person. Considering all the circumstances in connection with the fact that the respondent's attention was diverted to the light which he erroneously assumed to be the headlight of the locomotive of the approaching train (Peterson v. Minneapolis St. Ry. Co., 90 Minn. 52, 95 N. W. 751), it is apparent that there was sufficient evidence to take the issue of contributory negligence to the jury and to sustain its finding that the respondent was not guilty of contributory negligence.

4. While the amount of damages awarded is liberal, it is not so excessive as to justify us in interfering with the order of the trial court.

The other assignments of error have been carefully considered and found without sufficient merit to justify a reversal.

The order from which the appeal is taken is therefore affirmed.

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*The Doctrine of Imputed Negligence* is the subject of a recent note to *Hampel v. Detroit etc. R. R. Co.*, 110 Am. St. Rep. 278. An examination of this note will disclose that the decision of the Minnesota court in the principal case is supported by the great weight of authority.

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### SANFORD v. SAFFORD.

[99 Minn. 380, 109 N. W. 819.]

**COTENANCY—Adverse Possession by Grantee of One Co-tenant.**—Where one tenant in common conveys the entire property, and his grantee records the deed, enters into possession of the land, and holds it adversely for the statutory period, he acquires a good title as against the other cotenant, who was aware of such possession but not of the existence of the deed. (pp. 434, 435.)

S. L. Pierce, for the appellant.

J. W. Mason, for the respondents.

**381 ELLIOTT, J.** The appeal is from a judgment entered in an action for the partition of certain land, and the only question is whether the conclusions of law result from the findings of fact.

The essential facts as found by the court are as follows: The forty-acre tract of land in question was patented to the heirs of Augustus Miller. Through certain conveyances James B. Miller, as one of the heirs, became the owner of an undivided three-fourths interest in the land. The other one-fourth interest was in Helen B. Miller. On July 9, 1872, James B. Miller executed to one Mary Huston a warranty deed which purported to convey the entire forty acres. This deed was duly recorded on January 30, 1875. Mary Huston executed to one Cremer a quitclaim deed which also purported to convey the entire tract, and he, by a warranty deed dated May 28, 1877, conveyed the same land to Maria W. Safford. This deed was recorded on June 30, 1877, and the grantee went into possession of the entire tract and

"has ever since continued in the actual, open, notorious, exclusive, and adverse possession of said land and of the whole thereof, claiming title to the same, and has during all said time, and up to the time she conveyed the same as hereinafter stated, cultivated and improved the same, claiming title in fee to said land, and has during all said time paid the taxes thereon except the taxes for the year 1877, which were paid by the plaintiff for the purpose of procuring the record of his wife's deed from Helen Rosebraugh, hereinafter mentioned." On September 16, 1893, Maria W. Safford executed to the defendant George W. Kent a warranty deed of said premises which was duly recorded on October 4, 1893, and under which he has since been in possession of the premises <sup>382</sup> cultivating same. On July 4, 1878, and while the defendant Maria W. Safford was in the actual possession of the land, Helen A. Miller, one of the heirs of Augustus Miller, and then the owner of an undivided one-fourth of said tract, executed, her husband joining therein, a quitclaim deed of the forty-acre tract to Dorcas A. Sanford, then the wife of the plaintiff, which deed was duly recorded on July 22, 1878. Thereafter Dorcas A. Sanford died intestate, and the interests of her heirs in the land passed by conveyances to the plaintiff, Chester W. Sanford. At the time the defendant Maria W. Safford purchased the premises, the land was partly covered with grubs, "neither very large nor very numerous," and there was thereon about twelve acres of breaking made by Augustus Miller. Shortly after the purchase of the land by Maria W. Safford she grubbed and broke up that part not previously under cultivation, and during her occupation for the most part cultivated each year the entire forty-acre tract. During all of said time the plaintiff and his wife, up to the time of her death, resided within about one-half mile of the land in question. At the time of her purchase, and up to the time of her death, Dorcas A. Sanford had no actual knowledge of the character of the deed under which the defendant Maria W. Safford was holding possession nor any notice thereof except as would be implied from its due record.

From these facts the trial court properly found that George W. Kent is the absolute owner of the land free from

any claim of Dorcas A. Sanford, or anyone claiming under her.

It appears that Dorcas A. Sanford had no knowledge of the character of the deed under which Maria W. Safford was holding possession, nor had she any knowledge of the fact that any deed had been executed to Mrs. Safford. The party in possession was therefore a total stranger, and there is nothing to show that Mrs. Sanford knew that Mrs. Safford was holding, or was claiming to hold, under a conveyance from the other tenant in common. Without knowledge of the existence of a deed from the other tenant in common, the principle that one such tenant is entitled to assume that the other tenant has conveyed only his interest, has no application. This is simply, then, a case of an apparent stranger entering upon real estate and holding open, notorious, and exclusive possession thereof, adverse to all the world, for the statutory period. The facts were sufficient to put Mrs. Sanford upon inquiry, <sup>383</sup> and, had she investigated the nature of the claim of Mrs. Safford, she would have discovered that the latter was in possession under a deed, which was duly recorded, which purported to convey to her an absolute title to the entire tract. We are not required to determine whether the record of the deed was alone sufficient to put the other tenant in common upon inquiry. Under the circumstances of the case the record of the deed, in connection with the actual possession of the land taken thereunder, was notice to all parties interested that Mrs. Safford claimed to own the entire tract of land. It is settled by the previous decisions of this court that, where one tenant in common attempts to convey by warranty deed the whole estate in fee and his grantee records his deed and by virtue thereof enters upon the estate and claims and holds exclusive possession of the whole thereof, the possession and claim are adverse to the title and the possession of his cotenant and amount to a disseisin: *Ricker v. Butler*, 45 Minn. 545, 48 N. W. 407; *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702. See, also, *Bloom v. Sawyer*, 28 Ky. Law Rep. 349, 89 S. W. 204; *Chapman v. Kullman*, 191 Mo. 237, 89 S. W. 924; *Gardiner v. Hinton*, 86 Miss. 604, 109 Am. St. Rep. 726, 38 South. 779; *Stovall v. Judah*, 74 Miss. 747, 21 South. 614; *Sedgwick & Wait on Trial of Title to Land*, sec. 224.

The appellant lays undue stress upon the fact of the recording of the deed and disregards the effect of the fact of possession. The possession alone in this case, being that of a stranger, was sufficient to put Mrs. Sanford upon inquiry, and investigation would have disclosed the existence and character of the deed. Certainly the deed duly recorded and the possession taken and held thereunder was sufficient. The order from which the appeal is taken is therefore affirmed.

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*Adverse Possession of the Property of a Cotenancy by a grantee of one of the cotenants is discussed in the recent note to Joyce v. Dyer, 109 Am. St. Rep. 611.*

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### OLSON v. DAHL.

[99 Minn. 433, 109 N. W. 1001.]

**CONTRACT.**—A Judgment is not a Contract in any proper sense of the term. (p. 438.)

**LIMITATION OF ACTIONS—Part Payment.**—A Judgment for the recovery of money does not come within the rule that part payment revives and continues in force a contract obligation for the payment of money. (p. 439.)

**LIMITATION OF ACTIONS—Part Payment of Judgment.**—A cause of action is merged in the judgment and becomes extinct, and a part payment of the judgment, after the bar of the statute of limitations, does not, by implication, revive the original indebtedness and authorize an action to recover thereon. (p. 440.)

Willoughby M. Babcock, for the appellant.

Benjamin Drake, Jr., for the respondent.

**434 BROWN, J.** This action was commenced in September, 1905, to recover upon a judgment theretofore, in February, 1890, rendered in favor of plaintiff and against defendant in the district court of Hennepin county for the sum of sixteen hundred and thirteen dollars and ninety-five cents. Defendant pleaded in defense the statute of limitations, in reply to which plaintiff alleged that on December 24, 1904, defendant paid upon the judgment the sum of five dollars. The only question litigated in the court below was whether this payment was made upon the judg-

ment, or whether, as contended by defendant, it was a gift by him to plaintiff. The jury by their verdict resolved the question in her favor, thereby finding that it was a payment upon the judgment, and we adopt their conclusion as a fact in disposing of the case. Subsequently to the trial, defendant moved in the alternative for judgment notwithstanding the verdict, or for a new trial. Upon the consideration of this motion, the court held that the evidence was insufficient to justify the jury in finding that the payment was intended to apply upon the judgment, but that it was sufficient to justify the conclusion that defendant intended it to apply upon the original indebtedness upon which the judgment was rendered. It therefore denied defendant's motion for judgment or for a new trial, and ordered judgment for plaintiff in the sum of fourteen hundred dollars, the amount of the note upon which the judgment was rendered; the theory of the court being that, <sup>435</sup> though the judgment was not revived by the payment, the original indebtedness was. Plaintiff accepted the terms of the order, being satisfied with the judgment for the amount of the original indebtedness, with interest from the date of the payment in 1904, and defendant appealed.

The questions presented by the record for our consideration are: (1) Whether the rule of part payment, made the foundation of section 4086 of the Revised Laws of 1905, applies to a judgment for the recovery of money; and (2) if it does not, whether a part payment of a judgment, after it has become barred by the statute of limitations, will revive the debt upon which it was founded.

Section 4272 of the Revised Laws of 1905 provides that a judgment for the payment of money "shall survive, and the lien thereof continue, for the period of ten years after its entry, and no longer." Section 4075 of the Revised Laws of 1905 provides that no action shall be maintained upon a judgment or decree of court "unless begun within ten years after the entry of such judgment." The judgment in question was rendered in the year 1890, but this action was not commenced until 1905, fifteen years after its rendition, and is barred by the statute just referred to, unless the payment made in 1904 revived and continued the judgment in force. Section 4086 of the Revised Laws of 1905 provides that: "No acknowledgment or promise shall be



evidence of a new or continuing contract sufficient to take the case out of the operation of this chapter, unless the same is contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of a payment of principal or interest."

Chapter 16 of the acts of parliament of the twenty-first year of James I is the foundation of all statutes of limitations, both in England and this country. That act contained no exceptions preventing the operation of the statutes in cases where a new promise or acknowledgment of indebtedness, or part payment, was made by the debtor. The limitations of time within which actions were required to be brought were absolute. On the theory that the statute created simply a presumption of payment, or served only to extinguish the remedy of the creditor, the courts of England judicially ingrafted thereon an exception <sup>436</sup> to the effect that a new promise or part payment of the debt revived the cause of action and set the statute running anew. This interpretation of the law led to Lord Tenterden's act (9 George, c. 14), by which it was enacted that no new promise should be sufficient to take the case out of the operation of the statute, unless in writing signed by the party to be charged; further providing that the effect of part payment, which the courts had held operated to revive, should not be changed by that enactment. The purpose of that act was to put a limitation upon the rule ingrafted upon the original statute by the courts, by requiring the new promise, which the courts held sufficient to toll the statute, to be in writing. The act did not create the rule, but simply recognized its existence and limited or restricted its application or operation.

Thus the law came to this country, and a statute similar to Lord Tenterden's act is found upon the statute books of nearly all, if not all, of our states. Section 4086 of the Revised Laws of 1905 was taken from that act. The new promise or part payment has never, however, been applied to actions in tort, or those founded upon specialties. The rule has been confined to contracts, express or implied, for the payment of money. Where actions in tort or upon specialties are required to be brought within a specified time, no part payment or promise to pay will operate to suspend the operation of the statute, or remove the bar

when it has once attached: Wood on Limitations of Actions, 3d ed., sec. 66. The theory of the courts in this respect is that, as to such obligations, the action is not, and cannot be, founded upon a promise, either express or implied, but must, in the nature of things, be either in debt or covenant; therefore a new promise or part payment will not continue the right of action. The rule is fully discussed in Wood on Limitations of Actions, section 64 et seq., where the authorities are collected and referred to.

The question presented in the case at bar is whether a judgment for the recovery of money comes within the rule applicable to part payment, and whether, when made, it will revive the judgment and continue it in force. It is not at all difficult to demonstrate, theoretically at least, that a judgment is a contract. Blackstone makes the statement in his commentaries that it is, and some of the authorities, following in line with his theory, have classed it with specialties: 3 Blackstone's Commentaries, 160; *Sawyer v. Vilas*, 19 Vt. 43. <sup>437</sup> But a practical consideration of the question, in the light of the essentials to the existence of valid contract relations, leads to the contrary conclusion. In fact, the weight of authority, both in England and this country, is to the effect that a judgment is not a contract in any proper sense of the term: 1 Black on Judgments, 8; *Bidleson v. Whytel*, 3 Burr. 1548; *Morley v. Lake Shore etc. Ry. Co.*, 146 U. S. 162, 13 Sup. Ct. Rep. 54, 36 L. ed. 925; *Jordan v. Robinson*, 15 Me. 167; *Wyman v. Mitchell*, 1 Cow. 316; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *Smith v. Harrison*, 33 Ala. 706; *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494, 75 Am. St. Rep. 935, 53 Pac. 291. It is treated as a contract for certain purposes by some of the courts, for instance, in construing statutory provisions permitting several causes of action arising upon contract to be united in the same complaint. On the other hand, it is held not a contract within the meaning of the constitution, prohibiting legislation impairing the obligation of contracts (*Morley v. Lake Shore etc. Ry. Co.*, 146 U. S. 162, 13 Sup. Ct. Rep. 54, 36 L. ed. 925); nor within the rule by which the statutes of limitations are tolled by a new promise or part payment. That rule has been held distinctly not to apply to judgments: *McCaskill v. McKinnon*, 121 N. C. 192, 61 Am. St. Rep. 659, 23 S. E. 265; *Taylor v. Spivey*, 33 N. C. 427; *McDonald v.*

Dickson, 87 N. C. 404; Niblack v. Goodman, 67 Ind. 174; McAleer v. Clay County (C. C.), 38 Fed. 707; Berkson v. Cox, 73 Miss. 339, 55 Am. St. Rep. 539, 18 South. 934; Hughes v. Boone, 114 N. C. 54, 19 S. E. 63; Wood on Limitations of Actions, 3d ed., sec. 66; 19 Am. & Eng. Ency. of Law, 2d ed., 289. An extended discussion of the question will be found in the authorities cited, which we do not feel called upon to repeat. The case of Carchore v. Huyck, 6 Barb. (N. Y.) 583, holding that a judgment may be thus revived and continued, is criticised in Wood on Limitations of Actions as unsound. That is the only case to which our attention has been called wherein it is held that the rule of part payment does revive a judgment.

The question was not involved in the case of D. M. Osborne & Co. v. Heuer, 62 Minn. 507, 64 N. W. 1151, and what was there said on the subject must be treated as obiter. It appeared in that case that defendant had given plaintiff a promissory note for the amount of the judgment against him before the same had become barred by the statute, and the action was upon the note, not upon the judgment. The <sup>438</sup> court properly held that plaintiff was entitled to recover; the note having been given as collateral, or in payment of the judgment, which was valid and subsisting at the time and constituted a sufficient consideration therefor. It was immaterial in that case that the judgment had become barred before the action was brought on the note. The note constituted a new and independent express contract, and the contention that it lapsed and became extinct at the time the judgment became barred was not sound.

There are cases involving the limitation statutes wherein it is held that a judgment becomes wholly functus officio at the end of ten years, the period within which an action must be brought thereon, and that nothing short of an action to revive the same, or scire facias, in those states where that remedy is available, brought within the time fixed therefor, will save it from passing to its final sleep. Our statutes, which provide that absence from the state by the debtor shall not be counted in determining whether an action has become barred, was held by the supreme court of Maine not to apply to actions upon judgments: Lamber-ton v. Grant, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127.

But we are not required to go to that extent in the case at bar, and we express no opinion upon that subject, but hold that a judgment for the recovery of money does not come within the rule that part payment revives and continues in force a contract obligation for the payment of money.

It remains to be considered whether the part payment of a judgment, either before or after the same is barred by the statute of limitations, revives the debt upon which the judgment was rendered. It is elementary that a cause of action is merged in the judgment, and upon the entry of the judgment the same becomes changed in form and its original character wholly extinguished. The rule is stated in *United States v. Leffler*, 11 Pet. (U. S.) 86, 9 L. ed. 642, as follows: "If there be any one principle of law settled beyond all question, it is this: That whenever a cause of action in the language of the law, transit in rem judicatum, and the judgment remains in full force and unreversed, the original cause of action is merged and gone forever." Such is the rule of all the courts, so far as our examination of the authorities has extended. The original cause of action loses its identity and character and is changed and transformed into another cause of action, a judgment, and it can no longer be made the basis <sup>439</sup> of another action. Cases holding in harmony with this view are: *Davison v. Harmon*, 65 Minn. 402, 67 N. W. 1015; *Bank of Mobile v. Mobile O. R. Co.*, 69 Ala. 305; *Brown v. West*, 73 Me. 23; *Andrews v. Varrell*, 46 N. H. 17; *Brigel v. Creed*, 65 Ohio St. 40, 60 N. E. 991; *McDonald v. Dickson*, 87 N. C. 404; 20 Am. & Eng. Ency. of Law, 2d ed., 599.

In view of the authorities cited, we are unable to concur with the learned trial court in holding that the payment made upon the judgment here in question could by implication be referred to or operate to revive and continue the original indebtedness and authorize an action to recover thereon. Whether the original indebtedness, or the judgment after the bar of the statute has become fixed, could be made the basis of an express contract for its payment, we do not determine. No express contract is shown in this case, as was shown in *D. M. Osborne & Co. v. Heuer*, 62 Minn. 507, 64 N. W. 1151. The effect of part payment as an implied promise to pay the balance due is alone involved.

The order appealed from is therefore reversed, and the cause remanded with directions to the court below to award judgment for defendant.

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*The Doctrine of the Principal Case*, that a judgment is not a contract within the rule that a right of action on a contract may be taken out of the operation of the statute of limitations by a new promise or part payment, is supported by *Berkson v. Cox*, 73 Miss. 339, 55 Am. St. Rep. 539; *McCaskill v. McKinnon*, 121 N. C. 192, 61 Am. St. Rep. 659.

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### STATE v. COLEMAN.

[99 Minn. 487, 110 N. W. 5.]

**EXTORTION—What Constitutes—Intent.**—Where a detective, in order to secure evidence for a woman to use against her husband in a suit for a divorce, brings about a compromising situation between the husband and another woman so that he may detect them therein, which is done, he commits extortion if he then induces the husband, through fear of exposure, to pay hush money. (p. 445.)

**EXTORTION—Presumption of Intent.**—In a prosecution for extortion it is not necessary to prove the intent as an independent fact. If the state proves that the accused brought about a series of events by which he inveigled the prosecuting witness into a compromising position, and that he held over him the threat of exposure which induced him to give money to avoid it, the intent may be inferred. (p. 445.)

W. E. Dodge and E. L. Sutton, for the appellant.

Edward T. Young, attorney general, Charles S. Jelley, assistant attorney general, and A. J. Smith, county attorney, for the state.

<sup>488</sup> LEWIS, J. Appellant was indicted for the crime of extortion, it being charged that March 26, 1906, at the city of Minneapolis, with intent to extort and gain property from William D. Pencille, appellant obtained from him five hundred dollars by means of a threat to publicly accuse him of criminal relations with Louise Oelkers. The trial resulted in a verdict of guilty.

The chief witnesses on behalf of the state to sustain the charge were Pencille and Louise Oelkers, and from their testimony it appears that Pencille was married and Louise Oelkers unmarried, and about nineteen years old, employed as a servant in Pencille's household. An action for divorce had been commenced against Pencille by his wife, who had

previously left him, and appellant, a private detective in Minneapolis, was employed by her attorneys to secure evidence against Pencille.

The evidence is sufficient to prove that appellant entered into a scheme with Louise Oelkers to put Pencille in a compromising position with her for the purpose of using the evidence in the divorce suit, and further, that, having accomplished that purpose, he took advantage of the situation to extort money from Pencille. Appellant commenced operations by looking up the girl at Rochester, employed her to do housework in his family, induced her to write to Pencille to make an appointment with her at Minneapolis, arranged for a meeting between the two, at a certain rooming-house, and requested the girl to keep the appointment. Pencille arrived in answer to the girl's letters and met <sup>489</sup> her according to appointment, registered at the rooming-house as man and wife under an assumed name, and after he had been with her some time in the room assigned them, appellant, pursuant to his understanding with the girl, knocked at the door, and when it was opened, entered and pretended great surprise at finding them together.

Several interviews between Pencille and appellant followed, and, according to Pencille, he was told by appellant that, upon payment of one thousand dollars, the matter would be silenced, and, this being refused, an arrangement was finally made on the basis of six hundred dollars; that Pencille returned to his home, and, in accordance with the agreement, sent one hundred dollars to appellant by express, and some time thereafter came to Minneapolis for the purpose of paying over the other five hundred dollars, when appellant "held him up" for another one hundred dollars, for which he finally executed his note and paid the five hundred dollars in cash, making a total of seven hundred dollars.

Louise Oelkers testified that she received fifty dollars and no more from appellant, and stated in detail the arrangement between herself and appellant; that she wrote Pencille at appellant's dictation, and carried out the scheme and appointment with Pencille according to appellant's plans in order to secure the money.

Appellant denied that Pencille ever paid him any money whatever; admitted that he received by express a package

of one hundred dollars, but that it was sent to him for Louise Oelkers, and that he turned it over to her, and claimed that, in arranging the meeting between Pencille and the girl, he was acting within the scope of his employment as a private detective to secure evidence for his employer; denies that he ever threatened to expose Pencille; and claims that Pencille made overtures to him to hush the matter and offered him one thousand dollars for that purpose, which he declined to accept. To corroborate appellant, certain witnesses were produced who testified that they were in a neighboring flat and overheard a conversation between appellant and Pencille, in which he offered appellant one thousand dollars to quiet the matter.

Without entering any further into the particulars of the case, we will simply state that the credibility of all these witnesses was for the trial court and the jury, and, if the story detailed by Pencille and Louise Oelkers was true, being corroborated by other circumstantial evidence, the jury were justified in finding appellant guilty of the offense charged.

Extortion is defined in the Revised Laws, section 5096, as "the obtaining <sup>490</sup> of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." The statute then proceeds to define in particular what constitutes extortion, and, among other things, it is declared that "Every person who shall induce another by a threat to do an unlawful injury to the person or property of the one threatened . . . . or to accuse him . . . . of any crime, or to expose or impute to him . . . . any deformity or disgrace, or to expose any secret affecting him, . . . . and every person who shall extort any money or other property from another under circumstances not amounting to robbery, by means of force or any threat hereinbefore mentioned shall be guilty of extortion.

The court charged the jury as follows: "Extortion, so far as it is necessary to define it in this case, consists in obtaining the property of another with his consent, induced by the wrongful use of fear. The offense differs from larceny, which is unlawfully obtaining the property of another without the consent of the owner, in that the consent of the owner of the property does not constitute a defense to the indictment, but on the other hand does constitute an essential element of the offense, if such consent is obtained by the wrong-

ful use of force or fear. Under the statute creating and defining the offense, every person who shall induce another by a threat to accuse him of a crime, or expose or impute to him any deformity, or disgrace, or to expose any secret affecting him, to consent to part with his money or property under circumstances not amounting to a robbery, is guilty of extortion. There are three essential elements in this offense: (1) A threat to do one or more of the things mentioned in this statute; (2) the existence of a feeling of fear induced by such threats; and (3) the obtaining of property or money of another with his consent, induced by such fear and threat."

The court further charged that, if the jury should find from the testimony that the appellant did not make a threat to expose Pencille, or to impute <sup>491</sup> disgrace to him concerning his relations with Louise Oelkers, and that such threat induced a fear in his mind through which he was led to and did part with five hundred dollars, then they should find him guilty of the offense charged in the indictment.

The court further stated that, in determining whether or not a threat was made and the money was paid through fear, the question of the relationship between Pencille and Louise Oelkers, whether criminal or not, was immaterial, and that the real question for determination was not what the actual relations between the parties were, but did appellant threaten to expose Pencille to disgrace by reason of improper relations with the girl, and did such threat induce Pencille to pay appellant money?

Exception was taken to the charge upon the ground that the threat to use the knowledge obtained from the relations of Pencille and the girl as evidence in the divorce action was not an unlawful act, and that such a declaration was not a threat, within the meaning of the statute.

It seems to us that this criticism of the charge is entirely unfounded. In the first place, there is no criterion in law or morals which would justify even a private detective in thus persuading a weak-minded girl to place herself in a compromising situation, even for the purpose of procuring evidence for a prospective divorce suit, but, conceding that such conduct was justifiable under the circumstances, and that it was appellant's original intention to use the evidence so obtained for a legitimate purpose, yet if, after luring his



victim into the trap, he was induced by fear of exposure to pay appellant money to prevent the evidence being used, or made public, then appellant immediately abandoned his so-called legitimate enterprise and became guilty of the crime charged in the indictment. It matters not whether the threat was expressly conveyed or whether it was implied by the position of the parties brought about by appellant.

Appellant seeks to defend himself upon the plea that the money was not paid pursuant to a threat made by him, but that Pencille made the advances and voluntarily paid it to avoid exposure. The position is untenable as a defense. Appellant, having created the situation, and knowing the effect it might have on the mind of Pencille, took advantage of the fear thus created the moment he took the money knowing it <sup>492</sup> was paid for the purpose of purchasing silence. Under such circumstances, it is not important if he did not originally intend to bring about the situation for the ultimate purpose of extorting money, or that he did not expressly threaten exposure in case the money was not paid.

The point is made that there was no evidence in the case to show wrongful intent on the part of appellant, that intent is the gist of the offense charged, and that the trial court should have instructed the jury that intent could not be presumed but must be proven. In some jurisdictions, notably Iowa, intent to commit the crime of extortion is made the gist of the offense, and, in *State v. Debolt*, 104 Iowa, 105, 73 N. W. 499, it was held that intent cannot be presumed, but must be strictly proven.

Our statute is different, and, as applied to this case, makes the gist of the offense the obtaining of money by means of a threat. The statute does not make it necessary to prove intent as an independent fact. The state claims to have proven by credible evidence that appellant brought about a series of events by which he inveigled Pencille into a compromising position, that he held over him the threat of exposure which induced him to give appellant money to avoid it. If these facts are true, then the natural inference is that appellant intended such result should be accomplished when he accepted the money.

In *State v. Kortgaard*, 62 Minn. 7, 64 N. W. 51, the trial court instructed the jury that the law presumed in making

overdrafts it was with intent to defraud the bank, and, in speaking of the question of intent, the court said: "When an act, in itself indifferent, becomes criminal only when done with a particular intent, the intent must be proved, but, when the act is in itself unlawful, the criminal intent is presumed from the intentional commission of the act." In *State v. McGregor*, 88 Minn. 77, 92 N. W. 458, the court said: "It is the claim of the defendant that the evidence at most shows no more than a conversion of the watch, which would render him liable therefor in a civil action, but that falls short of showing that he converted it with criminal intent to deprive the owner of his property. But, when an act is in itself unlawful, the criminal intent is presumed prima facie from the intentional commission of the act": Citing *State v. Kortgaard*, 62 Minn. 7, 64 N. W. 51. A banker who receives money on deposit is presumed to know whether <sup>493</sup> his bank is insolvent: *State v. Quackenbush*, 98 Minn. 515, 108 N. W. 953.

The court was correct in instructing the jury that, if they found the facts above stated to be true, then they should find appellant guilty of the crime charged in the indictment.

Exception was taken to the charge of the court that the question of relationship between Pencille and Louise Oelkers, whether criminal or not, was immaterial. The court was entirely correct. The relationship between the parties was a purely collateral matter, having nothing to do with the real issue presented by the indictment. We find no error in the charge, nor in any of the rulings.

Order affirmed.

#### WHAT CONSTITUTES THE CRIME OF EXTORTION.

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#### I. Scope of Note.

In this note we shall discuss the nature of the offense of extortion at the common law and also the nature of the offense, commonly

known as extortion, which is committed where one obtains property from another by threatening to accuse such person of some crime or of publishing or imputing some disgrace to him. We shall, however, exclude from our consideration conspiracies to commit the crime of extortion, the use of threats in committing the offense of robbery, and questions affecting the legality of contracts based on threats.

## II. General Definition of Extortion.

a. **At the Common Law.**—At the common law extortion is defined as the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than is due or before it is due: *Collier v. State*, 55 Ala. 125; *Walsh v. People*, 65 Ill. 58, 16 Am. Rep. 569; *State v. Stotts*, 5 Blackf. 460; *Commonwealth v. Mitchell*, 3 Bush, 25, 96 Am. Dec. 192; *Commonwealth v. Bagley*, 7 Pick. 279; *Runnells v. Fletcher*, 15 Mass. 525; *People v. Whaley*, 6 Cow. 661; *State v. Maires*, 33 N. J. L. 142; *Respublica v. Hannum*, 1 Yeates, 71; *Commonwealth v. Saulisbury*, 152 Pa. 554, 25 Atl. 610; *State v. Critchett*, 1 Lea, 271; *Williams v. State*, 2 Sneed, 160; *State v. Merritt*, 5 Sneed, 67; *Cross v. State*, 1 Yerg. 261; *United States v. Waitz*, 3 Saw. 473, Fed. Cas. No. 16,631; *United States v. Deaver*, 14 Fed. 595; 4 Blackstone's Commentaries, 141; 1 Hawk. P. C., c. 68, sec. 1; Coke's Littleton, 363 b; 1 Russell on Crimes, p. 324. Mr Bishop defines it as "the corrupt demanding or receiving by a person in office of a fee for services which should be performed gratuitously; or, where compensation is permissible, of a larger fee than the law justifies, or a fee not due": *Bishop on Criminal Law*, sec. 390.

In most of the states the crime of extortion is defined by statutes which substantially are declaratory of the common-law offense, though in some instances the statutory definitions may have enlarged the scope of the offense at common law: *State v. Logan*, 104 La. 760, 29 South. 336.

Thus in California the offense is defined both with respect to its special application to the charging of fees for official services and with respect to the offense in the enlarged sense generally given to the term "extort." The section of the statute which supplants the common-law definition of the offense provides: "Every executive or ministerial officer who knowingly asks or receives any emolument, gratuity, or reward, or any promise thereof, excepting such as may be authorized by law, for doing any official act, is guilty of a misdemeanor": Penal Code, sec. 70. While the section of the statute which defines the offense in the sense in which the term is more generally known provides: "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force, or fear, or under color of official right": Penal Code, sec. 518.

b. **Extortion as Distinguished from Oppression, Bribery or Robbery.**—Under the New York Penal Code, section 556, a public officer or a person pretending to be such, who unlawfully and maliciously, under pretense or color of official authority, “(1) arrests another or detains him against his will; or (2) seizes or levies upon another’s property; or (3) dispossesses another of any lands or tenements; or (4) does any other act whereby another person is injured in his property or rights—commits oppression, and is guilty of a misdemeanor.”

Thus, for instance, it is oppression for justices of the peace to refuse licenses to keepers of public houses because they have refused to vote a certain way: *Rex v. Williams*, 3 Burr. 1317.

“The distinction between bribery and extortion seems to be that the former offense consists in offering a present or receiving one, the latter in demanding a fee or present by color of office”: *State v. Pritchard*, 107 N. C. 921, 12 S. E. 50.

The court in *People v. Barondess*, 61 Hun, 571, 16 N. Y. Supp. 436, in discussing the nature of the crime of extortion under the New York case, said: “At common law extortion signified any oppression by color of right; but technically it was defined to be the taking of money by an officer by reason of his office, where none at all was due, or not so much due or when it was not yet due: Wharton on Criminal Law, 3d ed., p. 833; 1 Hawk. P. C., c. 68, sec. 1; *People v. Whaley*, 6 Cow. 661. These rules as to the taking of unlawful fees were codified in the Revised Statutes: 2 Rev. Stats., Edmond’s ed., pp. 669, 670, secs. 5-7, pp. 778, 779, sec. 17. And we also find there a provision making a verbal or written threat to accuse another of any offense, with intent to extort property or money, a misdemeanor: 2 Rev. Stats., Edmond’s ed., p. 712, sec. 2. The obtaining of money by force or fear does not, therefore, seem to have been extortion, either at common law or under the Revised Statutes. It was robbery, at common law, to extort money under the threat of charging one with an unnatural crime (*Rex v. Jones*, 1 Leach. C. C. 139; *Rex v. Donnally*, 1 Leach C. C. 193; *Rex v. Cannon*, Russ. & R. 146), and this view was taken of the provision of the Revised Statutes defining robbery in the second degree in *People v. McDaniels*, 1 Park. Cr. Rep. 198, notwithstanding the specific legislation to which I have referred, making the threat of such an accusation with intent to extort money a misdemeanor. Under the Revised Statutes, the sending of a letter threatening to accuse any person of any crime or to do any injury to the person or property of anyone, with a view or intent to extort any money, etc., was declared to be an attempt to rob; and the fact that this offense was placed in the same class as that of robbery was emphasized in *People v. Griffin*, 2 Barb. 427.

“It will thus be seen that the offense now under consideration, though classed for the first time in the Penal Code as extortion,

really completes the legislation against robbery, attempts at robbery and cognate offenses. Section 552 of the Penal Code is in the alternative, treating extortion by force and fear as one thing, and extortion by official action as another. These two methods of extortion are separately defined in subsequent sections, but it is apparent from the language of the section providing the penalty for extortion by force or fear (section 554) that the latter is but a supplement, under the name of 'extortion,' to robbery in the first, second and third degrees. This section (554) provides for such punishment only when the money or other property has been extorted by force or fear 'under circumstances not amounting to robbery'; in other words, when the money or other property has been obtained 'with the consent' of the complainant, and not 'against his will,' for really the main distinction between robbery in some degree and this form of extortion lies just there. Robbery is the unlawful taking against the will by means of force or violence or fear of injury, immediate or future, to one's person or property (Pen. Code, sec. 224), while extortion is the obtaining with consent by similar means."

**c. Threats as Constituting Extortion Under Statutory Provisions**

At common law the making of threats to accuse a person of some crime with the intent to extort money or property from him was not regarded as constituting the crime of extortion, although the books show several cases in which persons were indicted for such acts. The making of threats for such purposes was, however, made a felony by statute in England, although the offense does not appear to be known as the crime of extortion: 3 Russell on Crimes, 1896 ed., pp. 346, 347.

In perhaps most of the American states the acts of threatening to accuse one of a crime with intent to extort or gain from such person money or other property is a statutory offense, and is commonly known as the offense of extortion or by the name of blackmail in a few of the states: *People v. Choyinski*, 95 Cal. 640, 30 Pac. 791; *Chinn v. State*, 125 Ga. 789, 54 S. E. 751; *Utterback v. State*, 153 Ind. 545, 55 N. E. 420.

The statutes of California probably illustrate the nature of the statutes in other states upon the subject of threats in so far as they constitute the crime of extortion. Section 518 of the California Penal Code provides: "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." While section 519 provides: "Fear, such as will constitute extortion, may be induced by a threat, either: 1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or 2. To accuse him or any relative of his or members of his family of any crime; or 3. To expose or impute to him or them any deformity or disgrace; or 4. To expose any secret affecting him or them." And section 523 provides: "Every person who, with

intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in section five hundred and nineteen, is punishable in the same manner as if such money or property were actually obtained by means of such threat"; while section 524 provides: "Every person who unsuccessfully attempts, by means of any verbal threat, such as is specified in section five hundred and nineteen, to extort money or other property from another, is guilty of a misdemeanor."

The phase of the crime of extortion committed by threats to accuse another of a crime will be discussed in subdivision V.

### III. The Grade of the Offense as a Misdemeanor or Felony.

The offense of extortion, as the offense is known at the common law, is regarded as a misdemeanor: *State v. Brown*, 12 Minn. 490 (Gil. 393); *Commonwealth v. Evans*, 13 Serg. & R. 426.

### IV. The Taking of Illegal Fees as Constituting the Crime of Extortion.

a. **Who may be Guilty of the Offense.**—One cannot be guilty of extortion by color of his office where there is no such officer, as it is claimed that the defendant was known to the law: *Herrington v. State*, 103 Ga. 318, 68 Am. St. Rep. 95, 29 S. E. 931; *Kirby v. State*, 57 N. J. L. 320, 31 Atl. 213; *State v. Bauer*, 1 N. Dak. 273, 47 N. W. 378; *Garber v. Conner*, 98 Pa. 551. But the offense may be committed by a de facto as well as an officer de jure: *White v. State*, 56 Ga. 385; *Kirby v. State*, 57 N. J. L. 320, 31 Atl. 213; *State v. Causler*, 75 N. C. 442; *Commonwealth v. Saulsbury*, 152 Pa. 554, 25 Atl. 610; *Brackenridge v. State*, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360. A constable who, after his office has expired, collects illegal fees is responsible for the penalties, and cannot say that he did not collect them as an officer: *Jackman v. Bentley*, 10 Mo. 293. Likewise, a magistrate is liable for the acts of his assistant where he approves them: *Fowler v. Tuttle*, 24 N. H. 9. And a sheriff is liable for the penalty for extortion committed by his deputy: *Overholtzer v. McMichael*, 10 Pa. 139. But a deputy constable may be guilty of the crime of extortion: *Commonwealth v. Saulsbury*, 152 Pa. 554, 25 Atl. 610. In fact, any person clothed with official privileges and duties may be guilty of extortion, such as justices of the peace: *State v. Maires*, 33 N. J. L. 142; *Rex v. Seymour*, 7 Mod. 382; sheriffs: *Commonwealth v. Bagley*, 7 Pick. 279; *Hescott's Case*, 1 Salk. 330; constables: *State v. Merritt*, 5 Sneed, 67; jailers: *Commonwealth v. Mitchell*, 3 Bush, 25, 96 Am. Dec. 102; tax collectors: *Regina v. Buck*, 6 Mod. 306; clerks of court: *Rex v. Baines*, 6 Mod. 192; poundkeepers: *State v. Critchett*, 1 Lea, 271; special agents of the United States land department: *United States v. Schliverholz*, 137 Fed. 616. But inspectors appointed by

the treasury department to assist collectors of the port in enforcing the Chinese exclusion laws are not officers under the United States statutes regarding extortion: *Williams v. United States*, 168 U. S. 382, 18 Sup. Ct. Rep. 92, 42 L. ed. 509. And an attorney receiving payment of fees incurred by his client is not regarded as a public officer: *Wilcox v. Bowers*, 36 N. H. 372. Railroad corporations have been subjected to penalties for extortion: *Lewis v. New York Cent. R. Co.*, 49 Barb. 330.

**b. Necessity for Fees to have been Demanded or Exacted by the Officer.**—In *United States v. Harned*, 43 Fed. 376, it was held that under an indictment for extortion under the United States statutes it was necessary to prove that the illegal fees were exacted by the defendant and not paid to him voluntarily, the court observing: "In answer to this contention that the mere taking of illegal fees by an officer of the United States is punishable as extortion under this section, I will remark, in the first place, that the language used by Congress in this section does not apply any such rule of law, because the crime of extortion at common law was not proven by the mere taking of excessive or illegal fees by an officer unless they were exacted and paid unwillingly under color of his office."

But in *Leggatt v. Prideaux*, 16 Mont. 205, 50 Am. St. Rep. 493, 40 Pac. 377, in a suit for the recovery of the statutory penalty allowed against any officer "who shall receive" any illegal fees, it was held that the fact that the fees were paid voluntarily was no defense. The court said: "We seriously doubt the correctness of the contention that a payment is voluntarily made where a judgment is rendered and costs are taxed against a party to a suit, and paid by him in obedience to a demand by the justice who rendered the judgment, and who alone could issue process to enforce its collection: *American S. S. Co. v. Young*, 89 Pa. 186, 33 Am. Rep. 748; *American Ins. Co. v. Britton*, 8 Bosw. 148-155; *McKee v. Campbell*, 27 Mich. 497. It is unnecessary to pass on the question, however, because we think the doctrine of voluntary payment is not properly applicable to this case. The statute of itself is too plain a guide. The respondent, a justice of the peace, demanded and received excessive fees. The law was explicit in fixing his compensation, but he violated it. The same statute which fixed his fees said to him, 'If you violate this law by receiving illegal and excessive fees, the person who pays them to you may recover ten times the sum so paid to you; primarily as a penalty upon you, and incidentally as a remedy to him': *Lane v. State*, 47 N. J. L. 362, 1 Atl. 476."

The presentation by a county judge to a commissioner's court of a bill or fees, which are illegal, is such a "demand" for such fees as is prohibited by the Texas statute which subjects any officer who "shall willfully demand or receive higher fees than are allowed by law" to a fine: *Brackenridge v. State*, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360. But where the fees are for costs in a



criminal case, the officer cannot be charged with violation of a statute allowing a penalty for receiving more than legal fees in a civil action: *Stoddard v. Couch*, 23 Conn. 238.

**c. Necessity for the Fees to have been Demanded Under Color of Office.**

1. **In General.**—In order for the taking of the fees to constitute the person taking them guilty of extortion, they must have been taken under color of his office, or, in other words, in an official capacity: *Collier v. State*, 55 Ala. 125; *Shattuck v. Woods*, 1 Pick. 171; *Runnells v. Fletcher*, 15 Mass. 525; *Uling v. Truett*, 1 Mont. 322; *State v. Causler*, 75 N. C. 442; *State v. Pritchard*, 107 N. C. 921, 12 S. E. 50; *State v. Bauer*, 1 N. Dak. 273, 47 N. W. 378; *Miller v. Douglass*, 42 Tex. 288.

But under the statutory provisions on the subject existing in different states there have been a few apparently conflicting decisions upon the question whether an officer is liable to a penalty for taking fees for services for which no fees are enumerated in the fee bill. In *Walker v. Ham*, 2 N. H. 238, it was held that the officer was not liable under such circumstances. The court, in discussing the reasons for the rule, observed: "But other labor and expense may, in particular occasions, become indispensable to the due service of a writ, and, from their very nature, no just average price for them can be fixed before they are performed. Such are the removal and care of a great amount of property attached, or the employment of assistants, and the delay in making difficult arrests and commitments. And though under some views and to some purposes these duties constitute a part of 'the service of the writ,' yet they are not a part of the ordinary service, could not have any just average estimate previously placed on their value, or if they could have, that estimate, comprehending also the return of the writ, would probably exceed in the fee-bill the paltry sum of 'twenty-three cents.'"

So, also, in Texas, under a statute prohibiting the demand or receipt of "higher fees than are allowed by law," it was held that the fees must have been for services for which the law has authorized a fee: *Smith v. State*, 10 Tex. App. 413. And in Vermont, the court decided that where no fee is officially allowed by statute, the officer is entitled to charge such sum as shall be in proportion to the fees established by law: *Henry v. Tilson*, 17 Vt. 479; *Haynes v. Hall*, 37 Vt. 20. But, on the other hand, it has been held in Kentucky that where no fee is demandable, it is extortion to demand and receive one: *Commonwealth v. Mitchell*, 3 Bush, 25, 96 Am. Dec. 192. Under a statute prohibiting a demand for a fee "for any service other than those expressly provided for" by the statute, an officer is liable to a penalty for taking compensation for a service for which no fee is provided by law: *Simmons v. Kelly*, 33 Pa. 190.

But if money is received by the officer in good faith to settle a dispute and not for the officer's use, he is not guilty of extortion: *White v. State*, 56 Ga. 385. Where a justice of the peace, after having lost jurisdiction, rendered judgment for the amount demanded in the complaint with costs, the receipt of the costs under pretense of the judgment is extortion: *People v. Whaley*, 6 Cow. 661. Extortion is not committed by a constable because of demanding compensation for services outside of his county where he has made no return of the charges as official fees: *People v. Ramey*, 89 Ill. 34. And a charge for "committee work" for a certain number of days "with team" is private or nonofficial services as far as the team is concerned in a prosecution for extortion: *State v. Bauer*, 1 N. Dak. 273, 47 N. W. 378. A demand by a probate judge of attorney's fees for making application for entry of town lots and taking affidavits for them does not constitute extortion, even though it were unlawful for him to receive an attorney's fee in the case: *Ming v. Truett*, 1 Mont. 322.

2. **Effect Where the Excessive Fees are Taken for the Exercise of "Extra" Trouble or Exertion.**—The taking of greater fees than are allowed by the statute for the levying of an execution on the ground that extra trouble has been encountered by the officer levying the writ is prohibited by the statute: *Shattuck v. Woods*, 1 Pick. 171. The court, in the case cited, saying: "He claims to have received it as and for a compensation for his trouble in selling the goods which were taken on execution. The law gives no such compensation, but limits the officer to a fee for levying, to poundage, as it has been usually called, and a fee for travel in returning the execution. If this is an adequate compensation in some cases, it is a liberal one in others; and it was thought that, upon the whole, it would afford a sufficient reward. All actual expenses necessarily incurred are a charge upon the goods, such as expenses for storing them, perhaps for taking an account of them and removing them, if that should be necessary; but the officer can receive nothing for extra trouble, his compensation being provided for by the fee bill."

3. **Effect Where a Gross Sum is Received for Official Fees and Services as an Attorney.**—If a person, while register of the land office, acts as an attorney for an applicant for a mineral patent, and receives from such applicant a gross sum, which gross sum includes his official fees as such register without the portion constituting such official fees being specified, the taking of such gross sum will constitute extortion if the gross sum so taken is in excess of the fees allowed him by law: *United States v. Waitz*, 3 Saw. 473, Fed. Cas. No. 16,631.

**d. Necessity for Corrupt Intent on Part of Officer.**

1. **In General.**—At the common law it is an essential element of the crime of extortion that the person taking the illegal fee

did so with a corrupt and evil intent: *Cleaveland v. State*, 34 Ala. 254; *Leeman v. State*, 35 Ark. 438, 37 Am. Rep. 44; *Cobbey v. Burks*, 11 Neb. 157, 38 Am. Rep. 364, 8 N. W. 386; *State v. Pritchard*, 107 N. C. 921, 12 S. E. 50; *Respublica v. Hannum*, 1 Yeates, 71; *United States v. Highleyman*, Fed. Cas. No. 15,361.

But the existence of a corrupt intent is not essential in actions for the statutory penalty for taking greater fees than are allowed by law. In *Cobbey v. Burks*, 11 Neb. 157, 38 Am. Rep. 364, 8 N. W. 386, the court with respect to such statutory proceedings, said: "In criminal prosecutions for extortion at common law, the mala fides of the act is the very essence of the offense; yet cases of that kind furnish no authority applicable to a suit for the penalty imposed by our statute. Of such character are the citations to Bishop's Criminal Law, etc. The provisions of the statute of Pennsylvania were similar to those of our own. Under it, in a case exactly in point, the supreme court of that state used the following language: 'The penalty imposed by this act may be incurred by exacting fees which are supposed at the time to be legally demandable. By the very words of the prohibitory clause, the taking is the gist of the principle is applicable, and with irresistible force, to the case of an officer selected for his capacity, and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assertion of a sufficient share of intelligence to enable the party to follow a guide provided for him, with an unusual attention, clearness and precision. On any other principle, a conviction would seldom take place, even in cases of the most flagrant abuse, for pretexts would never be wanting. Sound policy, therefore, requires that the officer should be held to act at his peril, and we are of the opinion that the absence of a corrupt motive, or the existence of an agreement by the party injured furnishes no justification for doing what the law forbids': *Coates v. Wallace*, 17 Serg. & R. 75."

Likewise, in *Triplett v. Munter*, 50 Cal. 644, in a proceeding to remove the officer from his office for taking illegal fees, and recover a penalty given to the informer, the court said: "The proceeding is taken under section 772 of the Penal Code, which relates to the offense 'of charging and collecting illegal fees,' and of the neglect or refusal of an officer 'to perform the official duties of his office.' The same penalty is denounced against both offenses, viz., removal from office and a fine of five hundred dollars for the use of the informer. The provision is highly penal in its nature; and though the statute does not, in terms, require that the wrongful act must have been knowingly and corruptly done, we are satisfied that it was the intention of the legislature to visit with this severe penalty an act performed by an officer in perfect good faith and under an honest conviction that he was acting strictly within the line of his duty. It was not intended to punish an officer by removal

from office and with a penalty of five hundred dollars, for a mere error of judgment, in the honest discharge of his duties. In such cases it may be that if the wrongful act be established, the burden will be on the defendant to show affirmatively that it was done honestly and in good faith."

2. **Effect of Honest Belief that Fee Taken was Legal Fee or Ignorance in Relation Thereto.**—From what has been said in the preceding subdivision, it will be readily seen that the general rule is that ignorance or mistake of law as to the right to collect the illegal fees is no excuse for the taking of such illegal fees: *Levar v. State*, 103 Ga. 42, 29 S. E. 467; *Commonwealth v. Bagley*, 7 Pick. 279; *State v. Dickens*, 1 Hayw. 406; *State v. Merritt*, 5 Sneed, 67; *People v. Monk*, 8 Utah, 35, 28 Pac. 1115. But to the contra effect see *Leeman v. State*, 35 Ark. 438, 37 Am. Rep. 44; *State v. Cutter*, 36 N. J. L. 125; *Hirschfeld v. Ft. Worth Nat. Bank*, 83 Tex. 452, 29 Am. St. Rep. 660, 18 S. W. 743, 15 L. R. A. 639.

"That the justice of the peace believed he had a legal right to charge the fees he did, and acted in good faith in taxing and collecting the fees, constitutes no defense. It would be most dangerous to the welfare of society if an officer elected to administer the law could violate it to his own pecuniary advantage, and escape the consequences of his act by pleading ignorance of the statute he had violated.

"That ignorance of the law is no excuse is a postulate of law, but, unless the maxim is upheld, there would be innumerable problems presented to courts, and he who knew the least might fare the best; or, as is said by the supreme court of California (*People v. O'Brien*, 96 Cal. 171, 31 Pac. 45), 'the denser the ignorance the greater would be the exemption from liability.'

"The case is not one where there was a mistake of fact. The court of appeals of New York in *Gardner v. People*, 62 N. Y. 299, say: 'Such mistakes do not excuse the commission of prohibited acts. The rule on the subject appears to be, that in acts mala in se the intent governs, but in those mala prohibita, the only inquiry is, Has the law been violated?' *People v. Brooks*, 1 Denio, 457, 43 Am. Dec. 704; *Beckham v. Nackle*, 56 Mo. 546; *Commonwealth v. Emmons*, 98 Mass. 6; *Carr v. Trainor*, 36 Ill. App. 587; *Roberge v. Burnham*, 124 Mass. 277; *People v. Ulenk*, 8 Utah, 35, 28 Pac. 1115.

"The receiving of the illegal fees is the gist of the wrong under the statute, and, when such fees are deliberately accepted, the law is violated, and the liability attaches": *Leggatt v. Prideaux*, 16 Mont. 205, 50 Am. St. Rep. 498, 40 Pac. 377.

But a distinction exists to the effect that where a party has been honestly acting upon a supposed state of facts that do not really exist, the mistake of fact will be an excuse for his violation of the law. This mistake of fact, though, is different from a mere mistake

of law: *People v. Monk*, 8 Utah, 35, 28 Pac. 1115; *Bowman v. Blyth*, 7 Ellis & B. 26.

**3. Effect of Custom or Usage in Respect to Taking the Fee Exacted.**—It is no defense to a prosecution for charging extortionate fees that a usage or custom existed for taking such illegal fees: *Commonwealth v. Dennie*, Thach. C. C. 165; *Shattuck v. Woods*, 1 Pick. 171; *Lincoln v. Shaw*, 17 Mass. 410; *People v. Monk*, 8 Utah, 35, 28 Pac. 1115; *Ogden v. Maxwell*, 3 Blatchf. 319, Fed. Cas. No. 10,458. The defense of usage has been regarded with favor, however, in several cases: *Respublica v. Hannum*, 1 Yeates, 71; *Henry v. Tilson*, 17 Vt. 479.

**4. Effect Where the Fees are Exacted from a Person not Liable Therefor or After Having been Paid by Another.**—“Fees demanded of a person not liable, or voluntarily paid by a person not liable, although improperly and unjustly taken and accepted by the officer, and although, in certain cases, he may be punishable for the cheat or fraud, yet this is not extortion, as the fees, if excessive, are not obtained by color of his office”: *Dunlap v. Curtis*, 10 Mass. 210. Laboring to exact fees from one party after having received them from another is not extortion: *United States v. Chenault*, 2 Cranch. C. C. 70, Fed. Cas. No. 14,791.

**5. Effect Where the Fees are Demanded Before They are Due.**—The exaction of fees before they are due constitutes extortion at common law: *Levy v. English*, 4 Ark. 65; *Preston v. Bacon*, 4 Conn. 471; *Levar v. State*, 103 Ga. 42, 29 S. E. 467; *State v. Burton*, 3 Ind. 93; *Commonwealth v. Bagley*, 7 Pick. 279; *State v. Vassel*, 47 Mo. 444; *State v. Maires*, 33 N. J. L. 142; *Lane v. State*, 49 N. J. L. 673, 10 Atl. 360; *People v. Calhoun*, 3 Wend. 420; *State v. Merritt*, 5 Sneed, 67.

**a. Necessity for the Thing Taken to be Something of Value.**—The thing taken for the illegal fee must be something of value and not a mere promise to pay money: *State v. Stotts*, 5 Blackf. 460; *Commonwealth v. Cony*, 2 Mass. 523; *Commonwealth v. Pease*, 16 Mass. 91; *Rcx v. Burdett*, 1 Ld. Raym. 148.

## **V. The Making of Threats as Constituting the Crime of Extortion.**

**a. Nature and Grade of the Offense of Extorting Money by Means of Threats.**—The offense of extorting money from a person by means of threats is commonly known as the crime of extortion or black-mail. It was unknown to the common law by that name and is a crime of statutory origin. In some states it is declared to be merely a misdemeanor: *State v. Ullman*, 5 Minn. 13 (Gil. 1). See, also, in this connection subdivision II, c. The question, however, whether the crime commonly called extortion is a misdemeanor or felony depends upon the statutes of the various states. In New York it has been held to be a felony, since, under the New York

statute, it is the possible and not the actual punishment for an offense that determines whether it is a felony or not: *People v. Hughes*, 137 N. Y. 29, 32 N. E. 1105.

b. **What is the Gist of the Offense.**—The statutes against the making of threats or the sending of threats with intent to extort are intended to apply to cases where the intent of the person making threats is to obtain that which he is not entitled to in justice and equity: *State v. Hammond*, 80 Ind. 80, 41 Am. Rep. 791; *Commonwealth v. Jones*, 121 Mass. 57, 23 Am. Rep. 257; *People v. Thomas*, 3 Hill, 169; *People v. Griffin*, 2 Barb. 427; *Mann v. State*, 47 Ohio St. 556, 26 N. E. 226, 11 L. R. A. 656; *United States v. Elliott*, 51 Fed. 808.

“The crime for which the statute provides is not the declaration by a person of an intent to bring an offender against the law to justice, but the malicious threatening to accuse a person of a crime or offense, ‘with intent thereby to exact any money or pecuniary advantage whatever’”: *State v. Debolt*, 104 Iowa, 105, 73 N. W. 499. The gist of the statutory offense is the attempt to extort by threats, money, property or some pecuniary advantage, from another by compelling him to do some act against his will: *State v. Ullman*, 5 Minn. 13 (Gil. 1). In other words, this sort of extortion depends on the mind and intent of the wrongdoer and not on the effect or result upon the person sought to be coerced: *People v. Gardner*, 144 N. Y. 119, 43 Am. St. Rep. 741, 38 N. E. 1003, 28 L. R. A. 699; *United States v. Worrall*, 2 Dall. 384, 1 L. ed. 426. And where the offense is committed by means of a letter, it is not the words in the letter, but the intent to extort that constitutes the gist of the offense: *People v. Gillian*, 50 Hun, 35, 2 N. Y. Supp. 476, affirmed in 115 N. Y. 643, 21 N. E. 1117; *Commonwealth v. Goodwin*, 122 Mass. 19. It is immaterial whether the defendant originally intended to bring out the situation for the ultimate purpose of extorting money, or that he did not expressly threaten exposure of the situation in case the money was not paid, where he in fact took the money knowing it was paid for the purpose of purchasing silence: *State v. Colman*, 99 Minn. 487, ante, p. 441, 110 N. W. 5.

c. **What Constitutes a Sufficient Threat Under Statutes of This Character.**

1. **What Must be Threatened.**—A threat to enter a complaint for the commission of a crime is a threat to accuse one of the crime: *Commonwealth v. Carpenter*, 108 Mass. 15. To accuse one of a crime is charging him with it or declaring that he has committed the crime: *Utterback v. State*, 153 Ind. 545, 55 N. E. 420. A false statement that a warrant has been issued and that it will be served unless money is paid to stay process is a threat to accuse of a crime: *Commonwealth v. Murphy*, 12 Allen, 449. The threat of accusation need not be a threat to accuse the threatened person by course of

law. The statutes of this character are aimed at threats of any public accusations: *State v. Louanis* (Vt.), 65 Atl. 532. Threatening to expose a person to shame in the newspapers, or by circulars or handbills distributed in the community where the threatened person lived, is within the statute against extortions by means of threats: *Kistler v. State*, 54 Ind. 400. Threats to accuse one of conduct which would subject the threatened person to disgrace or to the ridicule or contempt of society when made with intent to extort money or property from such person are within the statutory prohibition: *People v. Cadman*, 57 Cal. 562; *People v. Tonielli*, 81 Cal. 275, 22 Pac. 678; *Motsinger v. State*, 123 Ind. 498, 24 N. E. 342; *State v. McCabe*, 135 Mo. 450, 58 Am. St. Rep. 589, 37 S. W. 123, 34 L. R. A. 127.

Where the threat made by the defendant with intent to extort was one to accuse the threatened person of a crime or offense, it is essential that the threat be to accuse the person of something which constitutes a public offense. Thus to threaten to accuse one of being a "disorderly person" is not a sufficient threat under the Iowa statute, for the reason that there is no such offense recognized by the code of that state: *State v. Dailey*, 127 Iowa, 652, 103 N. W. 1008. Likewise, a threat to accuse one of "selling intoxicating liquors without then and there having a license to keep a dramshop" is not sufficient, since a person may, under the statute, sell liquors in certain quantities without such a license: *Rank v. People*, 80 Ill. App. 40. And a threat to accuse one of selling unwholesome meat is insufficient without showing that the accusation was also to charge the person with having sold such unwholesome meat with intent that it be used as food for human beings: *People v. Hoffman*, 126 Cal. 366, 58 Pac. 856. So, also, where the threat which it was alleged the defendant made was that he had charged the threatened person and another with "unlawfully, shamefully and habitually having sexual intercourse together," it was held insufficient as a threat, since it did not constitute a crime under the statutes relating to sexual crimes in Missouri: *State v. Sekrit*, 130 Mo. 401, 32 S. W. 977. A threat to arrest a person in civil proceedings is not a threat to injure the "person" of another under a statute making such threats constitute a crime: *Commonwealth v. Mosby*, 163 Mass. 291, 39 N. E. 1030. It is immaterial, however, that the crime, the accusation of which was threatened, was a federal offense such as the violation of the revenue laws: *People v. Sexton*, 132 Cal. 37, 64 Pac. 107.

**2. Necessity for the Alleged Threat to be Definite and Understandable.**—The threats prohibited by statutes of this character may, as a general rule, be made in writing or verbally: *Commonwealth v. Moulton*, 108 Mass. 307. Any words or acts calculated and intended to cause an ordinary person to fear an injury to his person, business or property are generally deemed sufficient: *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769.

"The statute cannot be evaded under the guise of friendship. No precise words are needed to convey a threat. It may be done by innuendo or suggestion. To ascertain whether a letter conveys a threat, all its language, together with the circumstances under which it was written, and the relations between the parties may be considered, and if it can be found that the purport and natural effect of the letter is to convey a threat, then the mere form of words is unimportant": *People v. Thompson*, 97 N. Y. 313.

Where an intent to extort or gain money by means of threats is apparent, the mere form of words is of no consequence: *People v. Wickes* (App. Div.), 98 N. Y. Supp. 163. The meaning of a threatening letter may be ascertained from all the circumstances of the case: *State v. Hollyway*, 41 Iowa, 200, 20 Am. Rep. 586; *Longley v. State*, 43 Tex. 490. Its meaning may be aided by parol evidence: *People v. Triscoli* (App. Div.), 102 N. Y. Supp. 328. A newspaper article referred to in the threatening letter is admissible to explain the object of the writer of the letter: *People v. Tonielli*, 81 Cal. 275. 22 Pac. 678. "It is not necessary that a threat should be apparent from the face of the letter, nor even necessary that it should be implied therefrom. The statute says if the language used is adapted to imply a threat, then the writing is sufficient. Parties guilty of the offense here alleged seldom possess the hardihood to speak out boldly and plainly, but deal in mysterious and ambiguous phrases—mysterious and ambiguous to the world at large, but read in the light of surrounding circumstances by the party for whom intended, they have no uncertain meaning": *People v. Choynski*, 95 Cal. 640, 30 Pac. 791.

It is sufficient if the language in the letter in connection with what preceded it and with what followed between the parties imputed a threat to charge the crime alleged and that it was so understood by the parties: *Commonwealth v. O'Connell*, 12 Allen, 451; *Commonwealth v. Bacon*, 135 Mass. 521. But where the defendant brought about a series of events by which he inveigled the prosecuting witness into a compromising position and then held over him the threat of exposure which induced him to pay the money to avoid exposure, the natural inference is that the defendant intended such results should be accomplished when he accepted the money: *State v. Coleman*, 99 Minn. 487, ante, p. 441, 110, N. W. 5.

In *People v. Gillian*, 50 Hun, 35, 2 N. Y. Supp. 476, affirmed in 115 N. Y. 643, 21 N. E. 1117, the defendant was charged with sending letters threatening to accuse the complainant of having had sexual intercourse with a woman not his wife. The letters which were anonymous made no direct threat. After asking for a loan the letter read: "You will not refuse me this loan. You know that you cannot afford to refuse me. . . . I do not wish to reveal my identity for reasons, perhaps, which you can guess,



therefore, you may write the following address plainly in your letter: 'W. N. Wilkins, Jun., Lockford, N. Y.' P. S. Neither old John nor any of the family knows anything about this. This is straight goods, and your money will be returned in the fall with interest." The court, in holding the letter sufficient, when considered in connection with parol evidence, to show a threat to expose or impute to the complainant a disgrace with intent to extort money from him, said: "The appeal book contains nothing but the judgment-roll, and we are unadvised as to the nature and character of the proofs presented on the trial, and we must assume that the evidence was sufficient to sustain every material averment in the indictment. We are, therefore, on this appeal, limited to the examination of the single legal proposition presented by the demurrer, and renewed on the motion in arrest of judgment, which is: Do the facts stated in the indictment constitute an indictable offense? The learned counsel for the defendant makes the point that it should appear on the face of the letter or writing on which the prosecution is founded that the writer threatened to do one of the four things mentioned in the statute, and the character of the threat should be set out in the indictment; that in this case it does not appear on the face of either of the letters that the defendant made the threat that, if the complainant refused to make the loan of money as requested, he would charge him with having committed adultery with the woman named in the indictment, or with any other person. It must be admitted that, if the defendant had it in his mind, when he prepared and mailed the first letter, to make the accusation mentioned in the indictment, it is not clearly disclosed on the face of the letter, and the jury, in a mere perusal of the same, would not be permitted to find that the charge in the indictment was true. The rule undoubtedly is, that a threat of the character mentioned in the statute must be made in the letter or writing delivered to the complainant, and if this is not made to appear to the satisfaction of the jury, the prosecution must fail. But as we understand the rule parol proof may be introduced by the people for the purpose of showing that, by the use of the language, figures and phrases employed by the writer, he threatened to make the charge as set forth in the indictment, and that the person to whom it was addressed so understood its meaning. If such is not the rule, much of the wrong and mischief intended to be reached by the statute would escape punishment. A person, by the use of a phrase or a word, or by referring to some prior circumstance well known to both parties, might convey to the mind of the person addressed the understanding that, if the thing requested or demanded was not done, the writer would accuse him of some criminal offense or violation of the moral laws of the community where he resided, which would bring him into contempt and disgrace. The gist of the offense is the attempt to extort money by a malicious threat to accuse of some crime."

And in another case it was held that a threat "to proceed against you criminally" was equivalent to a threat to accuse such person of a crime and that evidence of what took place at the interview had in pursuance of the letter containing the statement was competent to explain or extend its meaning: *People v. Eichler*, 75 Hun, 26, 26 N. Y. Supp. 998 (dismissed on motion in memorandum decision in 142 N. Y. 642, 37 N. E. 567).

A letter reciting: "It is my duty to inform you that I am a minor, and I have bought lickier of all kinds from your bartender, and I have been before the Grand Jury too times about it. I have told you about selling your Lick to Dick Wynne and myself. I told Julius Goldberg that I was not but 19 years old and yet he would sell me Licker any time I wanted it. Mr. Davidson I know of more than ten times that you sold Licker to boys that was not of age. Know you can do as you please give me \$25.00 to leave this part of the country if you want to. If you want me to leave this part of Texas you had better do as I said for you to do. It will save you as much as \$1000 by doing as I say. Rite as soon as you get it. I cant lye for you or anybody else."—shows clearly that the writer was attempting to extort money from the person to whom the letter was sent by threatening to accuse him before the grand jury, and continue his accusation by testifying in the courts, for violation of the law in selling intoxicating liquors to a minor. In this case the court very pertinently observed: "It is absurd to contend that the threatening letter to extort money must contain all the statutory elements of the offense with which the party expects to charge the person to whom the letter is sent, and it is furthermore unreasonable to say that such letter should be written with a direct statement that he intended to prosecute him unless the money was forthcoming. We understand the law to be: If, from the reading of the letter it is manifest, in a clear and unambiguous manner, that the writer of the letter intended to extort money on a proposed prosecution, it is a matter of indifference as to how the letter is worded. Appellant's contention that it does not state the offense, if correct, would lead to a very remarkable state of affairs, so far as the enforcement of this particular statute is concerned. In order to write a letter and extort money, under appellant's contention, the writer would have to know the technical law with reference to the offense with which he accuses the person to whom he sends the letter, or with which he threatens to accuse him. If the party writing the letter has knowledge of the technical law with reference to the offense with which he proposes to accuse the receiver, then this self-same knowledge would prevent him from using the same, because he would immediately know that by so doing he would be violating the law. In other words, if the sender of the letter knows how to state the technical offense, or, rather, the technical phrases in which an offense must be expressed, before he

can be prosecuted for sending a threatening letter to extort money, then he would not state the technical phrases in the letter. On the other hand, if he is not versed in the technical knowledge of the law with reference to the offense of which he proposes to accuse the party, to say that his ignorance of this technical knowledge should be a defense against his mendacity and effort to extort money would be defeating the very object, purpose and intent of the statute under consideration. We think that the indictment is amply sufficient to set forth the offense with which appellant is charged; that it does so in as explicit terms as can be made, and the whole text of the letter is such as indicates to every reasonable intendment that the party writing the letter intended it as a threatening letter to extort money; and this is a violation of the statute, regardless of whether he has expressed it directly or indirectly, or whether logically or illogically": *Wynne v. State*, 41 Tex. Cr. Rep. 504, 55 S W. 837.

A verbal threat that "it would not be good" for the prosecutrix to institute bastardy proceedings against the one making the threat is not a sufficient threat within the statute which makes it a crime for anyone to "accuse another of crime or to do any injury to the person or property of another" with intent to compel the person so threatened to do an act against his will: *State v. McGlasson*, 88 Iowa, 667, 56 N. W. 293. In another case, where a constable who had a search-warrant for the premises of the complainants directing him to seize intoxicating liquors which were alleged to be unlawfully kept upon said premises, the court said: "In our opinion there is not one word of evidence found in the abstract tending in the remotest degree to prove the threats or threatenings alleged in the indictment. The evidence which it is claimed tended in that direction is as follows: Cole testified that 'along about the middle of September I had a conversation with Mr. Pierce on the bridge. He said, "Jim, I have a search-warrant for your place over there." I said, "Is that so?" and he replied, "Yes, sir." He walked on and left me, and near the center of the bridge he stopped and waited until I caught up with him, and he said, "Jim, I hope you will appreciate this." I said, "Certainly"; and that is all there was to it.' Miller testified that 'about the 15th of September Mr. Cole reported to the firm that he had had a conversation with Frank Pierce. Within a day or so after that I met Pierce on Mulberry street, right north of the courthouse. I shook hands with him, and I said to him, "Frank, we are being told that you have a warrant for our place," says I: "We are doing a straight, legitimate business, and we do not want our stuff carried off. We do not want the report to go out that we have been searched, because it will hurt our business." "Well," he says, "if you fellows can come up and do something for me, it is all right. I am not in this thing for my health." ' Trotter gave the following evidence: 'I was in the drug business—a member of the firm of Trotter,

Miller & Cole. Last September Cole reported to me that Frank had a warrant for our place, and I reported it to Miller. About that time I met Frank on East Locust street, and passed the time of day with him. He said he would be around to our place in a little while. He came around, perhaps an hour afterward. Dr. Miller and I were standing in the front part of the-store. I gave Frank ten dollars. He remained a few minutes and went out. I had a subsequent meeting and conversation with Mr. Pierce about three weeks afterward. I met him in the north end of the courthouse hall, and gave him twenty dollars that I had with me, and that I had agreed to give him; and I told him we had now made him two payments, and that he could not do that so often; that he must let us off easy. He said he guessed we would not be bothered any more; to do what was right and go ahead.' No threats are shown by this testimony which are contemplated by the statute prescribing the offenses under which the indictment was found." The court further observed that the evidence did, however, show negotiations for a bribe for the omission of the defendant's official duty: *State v. Pierce*, 76 Iowa, 189, 40 N. W. 715.

But where the threatening language used by the defendant in endeavoring to collect money received as insurance on buildings which were alleged to have been unlawfully burned by the threatened person, was that "I will prosecute you" or "I will have you prosecuted," it was held to be a matter for the jury whether the language was a threat to accuse of crime or to prosecute civilly: *Commonwealth v. Goodwin*, 122 Mass. 19.

### 3. Necessity for the Unlawful Use of Fear to be the Controlling Feature of the Transaction.

**A. Whether the Threat Must Have Inspired Fear.**—Under a statute which provides that: "A person, who, knowing the contents thereof, and with intent by means thereof to extort or gain any money or other property, . . . sends . . . any letter or writing threatening (1) to accuse any person of a crime . . . or (4) to expose or impute to any person any deformity or disgrace, is punishable by imprisonment for not more than five years," the crime may be committed by the sending of a letter conveying a threat to do the forbidden acts, provided that the letter is sent for the unlawful purposes mentioned in the statute. It is not necessary that the threat should inspire fear or that it should be calculated to produce terror. It is immaterial for the court or jury to enter upon an inquiry as to the probable force or power of the threats: *People v. Thompson*, 97 N. Y. 313. It is not essential that the threatened person became actually frightened by the threat: *State v. Bruce*, 24 Me. 71.

But in California, under a slightly different statute, the court held that the unlawful use of fear must be the operating or controlling

cause of the transfer of the property. In the California case the trial court instructed the jury to the effect that if the fear of the prosecuting witness induced by the threats of defendants entered to any extent whatever into the parting by him with his money, then the crime of extortion was committed. But the supreme court said: "This cannot be a sound declaration of law. If the fear working upon the mind of the prosecuting witness by reason of these threats formed but the slightest part of the operating cause which induced Nevilles to part with his money, then no extortion was committed. If affection or sympathy upon the part of the Nevilles for this defendant was the principal reason which induced him to part with his money, then there was no crime. In other words, our statute, section 518 of the Penal Code, defining extortion, says: 'The crime is only committed when the property is obtained with the consent of the owner, and this consent must be induced by an unlawful use of force or fear.' The statute can only mean that the unlawful use of force or fear must be the operating or controlling cause which produces the consent. If some other cause were the primary and controlling one in inducing the consent, then there would be no extortion.

"In another form we find this principle stated in *People v. Haynes*, 11 Wend. 557, a case of obtaining property under false pretenses. It is there decided: 'The position that the falsehood had a material effect upon the person defrauded in procuring the property necessarily implies that without it the object of the felon would have failed; he could not have obtained it; at least, we are disposed to require the false pretense or pretenses to be so material that without the existence of their influence upon the mind of the person defrauded he would not have parted with the property.' Tested in the measure furnished by this decision, these instructions fail. The fear induced by the threat may have formed a part of the reason for the payment of the money, and yet the defendant be not guilty, for such a fear does not necessarily exclude the idea that the prosecuting witness would have parted with the money in the absence of that fear. This 'part of the reason' must be so material that the money would not have been paid without it. And when so material it is the moving or operative cause which produces the consent to part with the money': *People v. Williams*, 127 Cal. 212, 59 Pac. 581.

The threat must be of such a nature as to unsettle the mind of the person on whom it is intended to operate and take away from his acts that free, voluntary action which alone constitutes consent: *State v. Louanis* (Vt.), 65 Atl. 532.

**B. Effect Where the Threatened Person was Acting as a Decoy.**—In *People v. Gardner*, 144 N. Y. 119, 43 Am. St. Rep. 741, 38 N. E. 1003, 28 L. R. A. 699, the defendant was indicted for attempting to commit the crime of extortion by attempting to obtain a certain sum of money from the keeper of a house of prostitution by threatening to accuse her of keeping such a house. The person so threatened

who admitted the keeping of such a house had been acting as a decoy of the police for several months trying to induce the defendant to receive money from her under such circumstances as would render him guilty of a crime. The evidence tended to show every element of the crime of extortion, as defined by the statutes of New York, except that the threatened person was not actuated by fear in paying to defendant the money exacted by him. This last fact was urged as constituting the omission of an essential element of the crime, but the court said: "The threat of the defendant was plainly an act done with intent to commit the crime of extortion, and it tended, but failed, to effect its commission, and therefore, the act was plainly within the statute an attempt to commit the crime. The condition of Mrs. Amos' mind was unknown to the defendant. If it had been such as he supposed, the crime could have been, and probably would have been, consummated. His guilt was just as great as if he had actually succeeded in his purpose. His wicked motive was the same, and he had brought himself fully and precisely within the letter and policy of the law. The crime, as defined in the statute, depends upon the mind and intent of the wrongdoer, and not on the effect or result upon the person sought to be coerced."

The general rule applicable to the use of decoys, and especially in cases where the defendant is the passive agent while the decoy is the active agent in the commission of the crime, will be found in the majority and dissenting opinion in *People v. Mills*, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131.

**C. Effect Where the Threatening Letter was Sent as a Mere Joke.** Inasmuch as the gist of the offense is the sending of the threatening letter with intent to extort money from the person to whom it is sent, the sending of such a letter merely in sport to give annoyance, but with no intent to extort money, is not sufficient to constitute the crime of blackmailing. And where the sending of the threatening letter is claimed to have been sent as a mere "rough joke," it is proper to show that all of the parties to the transaction had played "jokes" of this general character upon each other. *Norris v. State*, 95 Ind. 73, 48 Am. Rep. 700.

**4. Necessity for the Object of the Threat to be the Extorting of Property With the Apparent Though not Real Consent of the Owner.**

**A. In General.**—The ordinary meaning of the word "extort" is the taking or obtaining of anything from another by means of illegal compulsion or oppressive exaction: *State v. Logan*, 104 La. 760, 29 South. 336; *Mann v. State*, 47 Ohio St. 556, 26 N. E. 226, 11 L. R. A. 656; *United States v. Deaver*, 14 Fed. 595. To "extort" means to obtain money or other property either by compulsion, by actual motives applied to the will, often more overpowering and irresistible

than physical force: *Commonwealth v. O'Brien*, 12 Cush. 84. In statutes providing for the punishment of those who extort money from others, the word "extort" is used in the broad sense of meaning to obtain from a holder desired possessions or knowledge by force or compulsion, or by menaces, duress or the like: *Cohen v. State*, 37 Tex. Cr. Rep. 118, 38 S. W. 1005. The purpose of statutes against the crime of extortion, used in the sense of blackmail, is to prevent the obtaining of property from another with his consent, induced by a wrongful use of force or fear, or under color of official right: Cal. Pen. Code, sec. 518; *People v. Tonielli*, 81 Cal. 275, 22 Pac. 678; *People v. Hoffman*, 126 Cal. 366, 58 Pac. 856; *People v. Barondess*, 61 Hun, 571, 16 N. Y. Supp. 436.

**B. Effect Where the Threats are Made in Connection With Demands or Claims Under Color of Right by Attorneys and Others.**—Although there are a few cases which apparently are to the contrary effect, the general rule is that statutes which make the use of threats with intent to extort constitute the crime of extortion, or robbery in a few of the states, are not intended to apply to honest efforts on the part of a person to obtain that which in justice and equity belongs to him: *McMillen v. State*, 60 Ind. 216; *State v. Hammond*, 80 Ind. 80, 41 Am. Rep. 791; *State v. Hollyway*, 41 Iowa, 200, 20 Am. Rep. 586; *Commonwealth v. Jones*, 121 Mass. 57, 23 Am. Rep. 257; *People v. Griffin*, 2 Barb. 427; *People v. Thomas*, 3 Hill, 169; *Mann v. State*, 47 Ohio St. 556, 26 N. E. 226, 11 L. R. A. 656; *United States v. Elliott*, 51 Fed. 807; *Rex v. Williams*, 7 Car. & P. 354.

In discussing this subject the court in *Mann v. State*, 47 Ohio St. 556, 26 N. E. 226, 11 L. R. A. 656, said: "To constitute the offense described in the statute, there must be an intent to extort or gain the objects therein specified. Extortion is a wrongful exaction. It has been well defined as the obtaining of money or other valuable thing, either by compulsion, by actual force, or by the force of motives applied to the will, and often more overpowering and irresistible than physical force. And the word 'gain,' when used in connection with the word 'extort,' must be understood as referring to a mode of acquisition equally exceptionable. In the civil law, the term is regarded as so significant that the expression 'lucri gratia'—for the sake of gain—is used to indicate the motive which evidences theft, as the criminal act of extortion, before the enactment into the Revised Statutes of section 6830, was denominated an 'attempt to rob.'

"An honest effort on the part of a creditor to collect a just debt, by accusing or threatening to accuse the debtor of a crime with which the debt is connected, or out of which it arose, does not, in our opinion, come within the purview of the statute, nor should the statute be construed as covering the case of an owner who demands from the offender a reasonable compensation for property which he

has maliciously and criminally destroyed, and accompanies his demand with a threat to accuse the offender of the crime."

In *State v. Bruce*, 24 Me. 71, the court, however, said: "A person whose property has been stolen cannot claim the right to punish the thief himself without process of law, and to make him compensate him for the loss of his property by maliciously threatening to accuse him of the offense, or to do an injury to his person or property, with intent to extort property from him. A threat made by one whose goods had been stolen that he would prosecute the supposed thief for the offense, if there were grounds to suspect him to be guilty, could not be considered as made maliciously and with intent to extort property, unless there were other proofs of malice and intended extortion."

The report of the case cited above does not show whether the defendant merely attempted to obtain compensation for the property alleged to have been stolen or whether he demanded a larger sum than its value.

It is undoubtedly true that an attempt to obtain compensation for an act which, besides having injured the property rights of the demanding party, is also a criminal offense, is always liable to excite in the mind of the party who committed the act a fear that the demand is a covert threat, but it does not appear that a person injured in his property rights is bound to forego an adjustment of his claim for compensation because of the covert threat which may be implied from the demand. It is quite likely, however, that if the demand is not made in good faith that an intent to extort could be made out.

Thus in Indiana, under a statute which made it a felony to threaten to accuse a person of any immoral conduct, which, if true, would tend to degrade and disgrace such person, with intent to extort or gain from such person any money or property, it was held that a husband who retained attorneys to commence a civil action for damages for an alleged seduction of his wife was not guilty of the offense prohibited by the statute, even though the settlement of the seduction case was effected by the attorneys inviting the defendant in the civil action to their office where he was informed of the contemplated suit, and the complaint, which was already prepared, was read to him, after which, on retiring to a consultation-room with the husband, the terms of the settlement were agreed upon. The court observed: "The statute quoted at the commencement of this opinion should not be so construed as to render the injured party liable to indictment for, in good faith, commencing an action against a seducer or an adulterer; or for making in good faith a charge against him, and demanding satisfaction, before the commencement of a suit. Such a charge, or threatened charge, would not be made for extortion but for obtaining just satisfaction": *McMillen v. State*. 60 Ind. 216. So, also, in Massachusetts, in a case where the de-



defendant was charged with having maliciously threatened to accuse a certain person with having made an indecent assault upon the wife of the defendant with intent to extort, the court allowed evidence of the truth of the accusation as tending to show that the demand which the defendant had made had been made without intent to extort money, since if such an assault had been made, the husband had a right to demand reparation: *Commonwealth v. Jones*, 121 Mass. 57, 23 Am. Rep. 257. But a distinction appears to exist where the writer of a letter knows that the charge upon which he is seeking to recover is a false charge of moral turpitude against the person to whom he is sending the letter. Thus where an attorney wrote a letter to the prosecuting witness which, after stating that he had been informed by a certain woman that there had been sexual intercourse between her and the prosecutor, and that she was with child by him, stated: "I suppose you are aware that under these conditions you are liable for the support of the child and the mother's expenses during her sickness. Are you willing to make suitable provisions for such liability, and thereby avoid publicity, or will it be necessary to take legal steps in the matter?" The court in sustaining the conviction on the charge of threatening to expose the prosecutor to disgrace by falsely and publicly accusing him of bastardy said: "It is claimed, on behalf of the defendant, that, to support a conviction under section 558 of the Penal Code for sending a threatening letter, the letter complained of must not only in itself contain a threat, but it must on its face be a threat to do an illegal thing. It is doubtless true that a demand for indemnity for a wrong, made in good faith, accompanied by a suggestion that legal proceedings will be resorted to unless satisfaction is voluntarily made, is not a threat within the statute, although the wrong is one the disclosure of which would bring disgrace upon the guilty party. But if the party making the demand knows that he has suffered no wrong, a threat to prosecute unless settlement is made might, we conceive, bring the case within the statute, although on the face of the letter the party writing it might seem to be asserting only his legal rights. In other words, a false accusation in writing of an act involving moral turpitude, known by the party making it to be false, accompanied with a suggestion that legal proceedings will be taken unless the person against whom it is made purchases silence, may be a threat within the statute, although in form the accused is simply called upon to render satisfaction for that which, if the charge was true, would entitle the accuser to pecuniary compensation. The mere form in which the threat is made is not decisive. The letter in this case distinctly intimated that legal proceedings would be taken to enforce the liability, unless the prosecutor made voluntary provision for the mother and child, and he is asked whether he is willing to do this to avoid publicity": *People v. Wightman*, 104 N. Y. 598, 11 N. E. 135. Where, however,

the threats made or the circumstances connected with the transaction strongly indicate that the threat of a criminal prosecution was used as a controlling force in obtaining the settlement of the claim or demand, and that the justice or equity of the alleged claim or demand was really lost sight of by the demanding party or its legality was but a thin disguise, then the object of the demand accompanied by the threat will be deemed a threat with intent to extort money or property thereby. Thus where an attorney who was employed in a suit to recover damages for a false arrest upon a fee contingent upon success, after several trials of the case, the plaintiff having recovered a large sum as damages, under an assumed name, upon stationery with such assumed name and with an address of a locked postoffice box, hired under such assumed name, writes letters to the defendant in the civil case under the guise of friendship, with suggestions that the plaintiff will ultimately defeat the defendant conclusively, and suggests that the defendant has committed perjury in the trial of the case, and that some one (that "some one" being himself) has obtained from the clerk's office a certified copy of the answer of the defendant, the allegations of which contain the basis of the alleged perjury, and advising the defendant to settle and compromise the damage suit, the facts warrant his conviction of the crime of blackmail in sending letters threatening to accuse the prosecuting witness of perjury and exposing him to and imputing to him disgrace with the intent to extort and gain money from him: *People v. Wickes*, 112 App. Div. 39, 98 N. Y. Supp. 163. Under a statute which made it an offense to make threats to accuse another of a crime with intent to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do an act against his will, it has been held in Michigan that an attorney cannot threaten to accuse a person of perjury unless he makes a conveyance to his client of land claimed by the client and with respect to which the perjury was alleged to have been committed. The evidence in the case tended to prove that the threat was intended as the controlling consideration for the conveyance: *People v. Whittemore*, 102 Mich. 519, 61 N. W. 13.

Where a person threatens to accuse another of having burned a building with intent to collect the insurance on such building unless the threatened person pays a certain sum of money, he is guilty of the crime of threatening to accuse of a crime with intent to extort: *Commonwealth v. Goodwin*, 122 Mass. 19; *Commonwealth v. Buckley*, 148 Mass. 27, 18 N. E. 577, 1 L. R. A. 624; *Elliott v. State*, 36 Ohio St. 318. In the case of *Commonwealth v. Goodwin*, 122 Mass. 19, just cited, the defendant had a contract with the insurance company that was claimed to have been defrauded to collect the insurance paid on the building alleged to have been burned by the insured, but the company repudiated the authority to collect for them upon learning of the methods that were being used by the defendant.

The courts do not favor the making of demands couched in language which clearly indicates that the person claiming compensation for some wrong will prosecute the person upon whom he is making the demand if he does not comply with his demand. Thus where the owner of a field of buckwheat made arrangements with a person to assist him in harvesting it for a portion of the crop, and there being a dispute as to the portion to be given for the services, the assisting person took more than the owner contended belonged to him, and the owner then sent him a letter stating: "Mr. Chapin, if you want to settle with me for what you have stolen from me, you can do so by paying me ten dollars; if not, I will put you where you will have a chance to look through iron," a conviction for maliciously threatening to accuse the assistant with larceny with intent to extort money from him was sustained. The appellate court, however, affirmed the rule that a threat made by one whose goods had been stolen, that he would prosecute the thief for the offense, if there were grounds to suspect him to be guilty, could not be considered as made maliciously, and with intent to extort property, unless there were other proofs of malice and intended extortion: *Commonwealth v. Coolidge*, 128 Mass. 55.

But in Indiana, under a statute which makes it a crime to accuse or threaten to accuse a person of any crime punishable by law with intent to extort or gain from such person any money or pecuniary advantage whatsoever, it was held that a letter to the effect that the person to whom the letter was sent obtained a certain sum from the writer by false pretenses, and stating: "Now, if you do not make arrangements to settle it in ten days I propose to prosecute you to the full extent of the law for obtaining money under false pretenses to defraud me. You can settle it by giving your note with good security payable in ninety days, with interest from the date of the receipt of the money; if you do not you will find yourself in a very close place, as it is a penitentiary crime. I have three of the best counsel that can be got in Wabash and Huntington," was not within the prohibition of the statute, the court saying: "We are of opinion that a threat to prosecute for an alleged or supposed offense connected with the creation of a debt, where the object of the threat is merely to secure the payment of the debt due from the person threatened to the person making the threats, does not come within the spirit or purpose of the statute": *State v. Hammond*, 80 Ind. 80, 41 Am. Rep. 791.

And where a fish and game warden, acting under the orders of the commissioner of sea and shore fisheries, wrote to a person who had been found in the possession of nine short lobsters in violation of law, the following letter: "Your lobster case is not yet settled. You owe the state \$9 and unless you send that amount to the commissioner at Boothbay Harbor, the Hon. A. R. Nickerson, on or before Sept. 6, I am ordered to take your case to the grand jury in

Rockland this term. Let me hear from you immediately," he is not guilty of maliciously threatening to accuse of crime with intent to extort, since under the fish and game law the commissioner has the right to "settle" such violations: *State v. Hanna*, 99 Me. 224, 58 Atl. 1061. And likewise the sending by the payee of a promissory note of a letter stating: "Upon examining the excise law, I find that note you made me require stamp, and that you are liable to fine of two hundred dollars for not stamping it. You will please call immediately and make satisfaction, and save yourself trouble," is not a threat with the intent of extorting money or other valuable thing within the purview of the statute, where the maker of the note had omitted to place the necessary stamp upon the note: *Brabham v. State*, 18 Ohio St. 485.

A person who sends letters or circulars to a debtor threatening to publish him as a bad debtor among his neighbors, and to advertise a claim against him for sale, is liable to prosecution and conviction under a statute making it a misdemeanor for any person to deliver any letter, circular, etc., threatening to do injury to the "credit or reputation" of another: *State v. McCabe*, 135 Mo. 450, 58 Am. St. Rep. 589, 37 S. W. 123, 34 L. R. A. 137.

**C. Threats to Incite Strikes or Boycotts or Prevent Their Discontinuance as Constituting Extortion.**—Inasmuch as an injury to one's business is an injury to one, a threat by one representing himself to have the control of certain striking employés, who had agreed to return to their employment upon certain conditions, which conditions were fulfilled by their employer, that the said employés would not return to their employment until the employer had "settled" with him, is a threat to do an "unlawful injury to the person or property of the individual threatened," within the meaning of the Penal Code declaring that "fear such as will constitute extortion" may be induced by such a threat, and hence such a threat is in violation of the Penal Code declaring that "extortion is the obtaining of property from another with his consent, induced by a wrongful use of force or fear, or under color of official right": *People v. Barondess*, 133 N. Y. 649, 31 N. E. 240. Likewise, under the statutes of New York, cited in the case above, a demand on the part of the president of a labor union for a certain sum of money from a plumbing contractor before he would permit striking plumbers to resume work on the job after the contractor was willing to accede to the demands for which they struck is extortion: *People v. Weinseimer* (App. Div.), 102 N. Y. Supp. 579. So, also, where the head of a large labor organization which had branches in all sections of the country, after having first threatened and then put into operation a scheme for lessening and damaging the business of a large firm of manufacturers by reducing the number of apprentices that they could employ, demanded a certain sum of money before he would

consent to the boycott which he had been instrumental in instituting being discontinued, even upon the firm being willing to accede to the requirements of the labor organization with respect to such apprentices, he is guilty of extortion. The court in this case (*People v. Hughes*, 137 N. Y. 29, 32 N. E. 1105), after reciting the various acts done by the defendant, said: "Conduct takes its legal color and quality more or less from the circumstances surrounding it, and the intent or purpose which controls it, and the same act may be lawful or unlawful as thus colored and qualified. One may refuse to deal with a firm because of a conviction that it does not give honest compensation for labor, and may ask his friends or the public to do the same thing, and the conduct may produce injury to the business criticised, without thereby becoming illegal. The jury were so told in substance, and permitted to judge whether that was the true quality and character of the prisoner's action. On the other hand, one may influence his friends and the public to inflict the same injury of withdrawal of custom without just or excusable reason, and by fraudulently concealing the fact that it does not, and pretending that it does, exist, and using official power and influence to make effective the deception, and to force and compel unwilling dealers to desist from their purchases, and that for the sole purpose of extorting money, in which case the resultant injury will be unlawful. What Hughes threatened was found by the jury to be such an unlawful injury. They saw that he conveyed the idea strongly and clearly that, unless his demand for money was complied with, he could and would, by threatening the hostility of the order, compel the retail dealers to withdraw their custom, and could and would utilize the power he had, although the original occasion for its exercise was gone. Such a threat, within the doctrine of the *Barondess* case, and within that, also, of the dissenting opinion in this court, amounts to a threat to do an unlawful injury to property: *People v. Barondess*, 133 N. Y. 649, 31 N. E. 240, 61 Hun, 571, 16 N. Y. Supp. 436. There was therefore a question for the jury, and the court could not properly have directed an acquittal."

In Montana, under statutes similar to that of New York, it was held that the word "property" as used in the Montana code did not include manual labor or the right of an employé to work, and hence that a threat by a foreman to discharge an employé from his employment unless such employé paid such foreman a certain sum demanded by him was not extortion: *In re McCabe*, 29 Mont. 28, 73 Pac. 1106.

On the general subject of strikes and strikers, see the monographic note to *O'Neil v. Behanna*, 61 Am. St. Rep. 706; and on the subject of boycotting, see the monographic note to *Gray v. Building Trades Council*, 103 Am. St. Rep. 488.

**5. Effect Where the Threats Were Made by Persons Other Than Those to Whom Money is Paid.**—One who induces another to pay

money by telling him that a third person is threatening to prosecute him and that he had better fix the matter up is guilty of extortion by means of threats: *Moore v. People*, 69 Ill. App. 398.

**6. Effect Where the Threats Were Made to Third Persons and not to the Person Paying the Money.**—In *State v. Brownlee*, 84 Iowa, 473, 51 N. W. 25, which was a prosecution for threatening to shoot a certain person with intent to procure his signature to certain notes, the court said: "It may be conceded that a threat, whether it be verbal, written or printed, to be within the statute, need not be made personally to the one threatened. In order to be a 'threat,' it must be so made, and under such circumstances, as to operate, to some extent at least, on the mind of the one whom it is expected to influence. If it does not do this, how can it be said to take away the voluntary character of his acts? It was not necessary that the statute should say, in terms, that the threat must be communicated in any way to the party threatened. The meaning of the word used, 'threat,' implies that it is a menace of some kind, which in some manner comes to the knowledge of the one sought to be affected thereby. It may be made in person to the object of it, or it may be brought to his knowledge by written communication, or in any other manner."

**d. Effect of the Guilt or Innocence of the Threatened Person.**—The general rule is that it is immaterial whether the person threatened is guilty or innocent of the accusation threatened: *People v. Chynski*, 95 Cal. 640, 30 Pac. 791; *Motsinger v. State*, 123 Ind. 498, 24 N. E. 342; *State v. Debolt*, 104 Iowa, 105, 73 N. W. 499; *State v. Goodwin*, 37 La. Ann. 713; *People v. Whittemore*, 102 Mich. 519, 61 N. W. 13; *State v. Coleman*, 99 Minn. 487, ante, p. 441, 110 N. W. 5.

But although the intent to extort may exist notwithstanding the truth of the accusation, yet in the light of surrounding circumstances, the fact that the accusation, which was threatened, is true may strongly aid in negating the intent to extort and may, in fact, show that the intent of the defendant was merely to obtain redress for the wrong done him by the threatened person: *Mann v. State*, 47 Ohio St. 656, 26 N. E. 226, 11 L. R. A. 656. In this connection see, also, subdivision V, c, 4.

**e. Effect Where No Property was Obtained by Means of the Threats.**—It is not necessary that money or property be in fact extorted by means of the threatening letter, under the general form of statutes existing in such cases, if the letter was sent with the intent to extort: *People v. Brennan*, 121 Cal. 495, 53 Pac. 1098. The right to take and prosecute an appeal is properly within the meaning of the code, so that a threat made to induce one to dismiss an appeal is a threat made with intent to extort property from another: *People v. Cadman*, 57 Cal. 562.

**f. Effect of Belief of Person Making the Threat as to the Truth of the Accusation.**—Ordinarily, it is immaterial whether the person making the threats believes that the person threatened is guilty: *People v. Eichler*, 75 Hun, 26, 26 N. Y. Supp. 998. But if a person making a demand for compensation for injuries caused by the alleged criminal acts of another in fact knows that the person from whom he is making the demand is innocent of the offense or disgrace which he threatens to accuse him of, the fact of his knowledge in that respect would tend to show that the transaction was for the purpose of extorting money from such person: See subdivision V, c, 4, B.

In *State v. Goodwin*, 37 La. Ann. 713, the court said: "We are not prepared to say that in connection with, and as an element of, evidence going to show proper motives for communication, and to rebut malice, the truth or even an honest belief in the truth of the charges might not, under some circumstances, be receivable in evidence. For instance, suppose the motive of the party sending a letter threatening to accuse another of a crime of which he believed him to be guilty had been to give the latter an opportunity of explaining his conduct and showing his innocence, if possible, before taking action, such facts would obviously rebut the imputation of malice, which is an essential element of the offense. But where, as in this case, the truth was offered as, of itself and by itself, a justification, it was properly rejected."

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MISSOURI.**

**STATE v. PALMBERG.**

[199 Mo. 233, 97 S. W. 566.]

**RAPE—Carnal Knowledge of Infant—Different Acts—Distinct Offenses.**—Each act of carnal intercourse with a female under the age of fourteen years constitutes a separate, distinct and substantive offense. (p. 480.)

**RAPE—Carnal Knowledge of Infant—Evidence of Prior Acts.**—Evidence of acts of intercourse occurring prior to the act for which the accused is being tried is admissible as tending to prove the particular act upon which the conviction is sought. (pp. 480, 481.)

**RAPE—Carnal Knowledge of Infant—Evidence of Subsequent Acts.**—Evidence of acts of intercourse with a female under fourteen years of age occurring subsequently to the act for which the accused is being tried is inadmissible. (p. 481.)

**RAPE—Carnal Knowledge of Infant—Several Acts of Intercourse—Election.**—If, in a prosecution for carnal intercourse with a female under fourteen years of age, the prosecutrix testifies to several distinct acts of intercourse occurring prior to her arriving at that age, the prosecution must, at the close of its case, on motion of the defense, elect upon which act of intercourse it will rely, and its failure to do so is reversible error. (pp. 485, 486.)

**RAPE—Carnal Knowledge of Infant—Several Acts of Intercourse—Time of Election.**—If, at the commencement of the trial of a prosecution for carnal intercourse with a female under fourteen years of age, the prosecution knows that the testimony will show several acts of intercourse, each constituting a separate offense, it should inform the accused upon what particular act it will rely for a conviction, but evidence of prior acts should then be admitted, although evidence of subsequent acts must be excluded. (pp. 487, 488.)

**RAPE—Carnal Knowledge of Infant—Exhibition of Child.**—On a prosecution for carnal intercourse with a female under fourteen years of age, the child to which the prosecutrix claims she gave birth as the result of her intercourse with the defendant may be exhibited to the jury. (p. 490.)

**RAPE—Carnal Knowledge of Infant—Evidence of Date of Birth.**—If, on a prosecution for carnal intercourse with a female



under fourteen years of age, the testimony of a physician tends to establish that he attended the mother of the prosecuting witness at the time of the birth of the latter, and he is enabled, by refreshing his memory from a memorandum-book, to reasonably fix the date of such birth, his testimony is admissible. (pp. 490, 491.)

**RAPE—Carnal Knowledge of Infant—Duty to Make Complaint.**—On a prosecution for the carnal knowledge of a female under fourteen years of age, an instruction as to her duty to make complaint of her ravishment has no application. (pp. 491, 492.)

W. F. Gringley, W. V. Draffen and C. D. Corum, for the appellant.

H. S. Hadley, attorney general, N. T. Gentry, assistant attorney general, and C. W. Journey, for the state.

<sup>236</sup> FOX, J. On the fifteenth day of May, 1905, the prosecuting attorney of Cooper county filed an information against the defendant that contained two counts. The first count charged that on or about the twentieth day of October, 1903, the defendant carnally knew one Florence Widdicombe, a female child alleged to be under the age of fourteen years. The second count charged that defendant had made an assault upon the said Florence Widdicombe on or about the twenty-seventh day of August, 1904, and alleged that said Florence Widdicombe was then and there an unmarried female of previous chaste <sup>237</sup> character between the ages of fourteen and eighteen years.

The defendant filed a motion to compel the state to elect upon which count of the information the state would go to trial. The motion was sustained and the state elected to go to trial upon the first count, and the trial proceeded upon that count.

The testimony on the part of the state tended to show that the prosecutrix was born in Pettis county, Missouri, on the twenty-seventh day of August, 1890, and that her parents were named Coselet; that her mother died when she was quite young and she was adopted by Mr. and Mrs. Henry Widdicombe. The prosecutrix testified that the defendant had intercourse with her on several occasions; the first time some time about the 20th of October, 1903; one time when she was in the woods driving up her foster father's cow; at another time at the home of the prosecutrix when her foster parents were absent; at another time on the road; and she also testified that the defendant continued to have intercourse with her until she arrived at the age of fourteen

years, and that such acts of intercourse occurred every week or so. There was further evidence offered on the part of the state which disclosed the fact that as a result of this intercourse the prosecutrix became pregnant and gave birth to a child, and the state, over the objections of the defendant, exhibited such child to the jury.

On the part of the defendant he testified in his own behalf and denied having intercourse with prosecutrix; his testimony directly contradicted that of the prosecutrix. There was other evidence introduced on the part of the defendant tending to impeach the prosecutrix and her foster parents as to conflicting statements made by them in reference to the age of the prosecutrix. There was also other testimony which tended to prove the bad reputation of the foster parents of the prosecutrix for truth and veracity. Defendant then offered <sup>238</sup> evidence tending to show his good reputation for morality and as a law-abiding citizen.

In rebuttal the state offered evidence to show the good reputation of Mr. and Mrs. Widdicombe for truth and honesty. There was other evidence introduced in the case which will be referred to and discussed during the course of the opinion. This, however, is a sufficient statement of the case to enable the court to determine the legal propositions involved.

At the close of the case the defendant, before proceeding to introduce his testimony, moved the court to compel the state to elect upon which one of the acts of intercourse, as testified to by the prosecutrix, it would proceed to go to the jury. The motion was overruled, and at the close of all the evidence the defendant renewed such motion, and it was likewise overruled. The cause was submitted to the jury upon the evidence and instructions of the court and they returned a verdict finding the defendant guilty as charged in the information, and assessed his punishment at imprisonment in the penitentiary for a term of five years. Timely motions for new trial and in arrest of judgment were filed and by the court overruled. Sentence and judgment were entered of record by the court, and from this judgment the defendant in due time and proper form prosecuted his appeal to this court, and the record is now before us for consideration.

The record in this cause discloses many complaints by appellant based upon the action of the trial court during the progress of the trial. The most serious proposition confront-

ing us upon this record arises upon the testimony of the prosecutrix and the law as declared by the court predicated upon such testimony. The record discloses that the prosecutrix, Florence Widdicombe, testified when she first took the witness-stand <sup>239</sup> that in October, 1903, the defendant pulled her off a horse and forcibly had intercourse with her. In her testimony she details all the facts surrounding this particular time at which she claims the defendant forcibly ravished her. Upon further examination she then proceeded to detail other separate and distinct acts of intercourse had between her and the defendant subsequent to the one which she had narrated as having occurred in October, and she was finally permitted to testify that the defendant continued to have intercourse with her until she arrived at the age of fourteen years, and that such acts of intercourse occurred every week or so. To this evidence of subsequent acts of intercourse the defendant interposed an objection, and to fully appreciate such objection we here reproduce it. It was as follows: "The defendant objects to what occurred at that time, for the reason that whatever did occur cannot be competent in this case. I assume that the purpose of the inquiry is to elicit evidence tending to show that the defendant, on days other than and subsequent to the occasion mentioned in evidence already, had intercourse with the prosecuting witness. In other words, the state expects to offer in evidence testimony tending to show another rape upon the prosecuting witness, at a different time. We object for the reason that it is another substantive offense, and evidence of other crimes is not competent in any case unless it be for the purpose of showing intent, motive or malice, and in this case there is no specific intent necessary to commit the crime; no motive or malice is necessary to be shown, and the evidence of another separate and distinct crime is absolutely incompetent in this case, as tending to throw no light upon the inquiry under investigation." The objection was overruled by the court.

At the close of the state's case and before the defendant went on the stand to testify in his own behalf, he requested the court to compel the state to elect upon which of the alleged acts of intercourse, as <sup>240</sup> testified to by the prosecutrix, it would rely for a conviction. This motion was also by the court overruled, and the defendant again at the close of the case renewed such motion in writing to compel the

state to elect upon which of the acts of intercourse, as testified to by the prosecutrix, it would go to the jury. This motion was likewise overruled, to which action of the court, upon both of such motions, the defendant properly preserved his objections and exceptions. The court at the close of the testimony embraced in one of its instructions this declaration of law; that is, "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, in the county of Cooper, and state of Missouri, at any time before the filing of the information herein, to wit, on the fifteenth day of May, 1905, had sexual or carnal intercourse with Florence Widdicombe, and she, said Florence Widdicombe, was then and there, at the time of said carnal intercourse, under the age of fourteen years, then you will find the defendant guilty of rape as charged in the information and assess his punishment at imprisonment in the penitentiary for a term not less than five years, or at death."

It is from these disclosures of the record that the legal propositions presented for our consideration arise.

1. It is clear that each act of carnal intercourse testified to by the prosecutrix constituted a separate, distinct and substantive offense. Upon this proposition it is hardly necessary to cite authorities: *People v. Clark*, 33 Mich. 112; *State v. Hilberg*, 22 Utah, 27, 61 Pac. 215; *State v. Acheson*, 91 Me. 240, 39 Atl. 570; *People v. Castro*, 133 Cal. 11, 65 Pac. 13; *People v. Williams*, 133 Cal. 165, 65 Pac. 323; *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73, and numerous other cases. This being true, it is insisted by appellant:

1. That the act of sexual intercourse first testified <sup>241</sup> to by the prosecutrix should be treated under the law as an election by the state as the act of carnal intercourse upon which it would rely for conviction; and that all the other evidence as to acts of sexual intercourse by the defendant with the prosecutrix, either prior to or subsequent to the time first designated in her testimony, was incompetent and irrelevant, and should have been excluded by the court.

Where a conviction is sought for the commission of an act of sexual intercourse which constitutes the offense, at some particular time, there is a sharp conflict in the authorities upon the proposition of the admissibility of evidence tending to show prior and subsequent acts of intercourse, as evidence tending to show the commission of the acts of intercourse

upon which the conviction is sought. We shall not undertake to review the authorities upon this subject. The reasonable limits to which an opinion should be confined is our only apology for failing to do so. It is sufficient to say upon this proposition that we have read with a great deal of care and interest the numerous cases in other states dealing with this subject, and the weight of authority seems to fully support the doctrine, in cases similar to the one now under consideration, that evidence of acts occurring prior to the act for which the accused is being tried, as tending to prove the particular act upon which the conviction is sought, is admissible. This court, in the case of *State v. Scott*, 172 Mo. 536, 72 S. W. 897, and *State v. Patrick*, 107 Mo. 147, 17 S. W. 666, has already indicated that upon that branch of the proposition it is in line with the weight of authority. It was expressly ruled in those cases that prior acts of the defendant were admissible in evidence as tending to show the commission of the act upon which a conviction was sought. In *Sykes v. State*, 112 Tenn. 572, 105 Am. St. Rep. 930, 79 S. W. 113, it was fully recognized that the great weight of authority was in favor of the admissibility of prior acts, and the cases<sup>242</sup> are fully collated and cited in support of the correctness of that view, and there is no necessity of again citing them in this case.

Upon the other branch of this proposition, as to the admissibility of subsequent acts in evidence in cases similar to the one at bar, there is also a conflict of views of the courts in the different states. However, after a careful consideration of all the cases, it is made apparent that the weight of authority is against the admission of such subsequent acts. The conclusions of the courts that subsequent acts are inadmissible are based mainly upon grounds similar to those urged by the distinguished judge in the case of *People v. Clark*, 33 Mich. 112. Judge Marston in that case thus stated tersely the views of that court upon the proposition. He said: "Nor could the prosecution, after having introduced evidence tending to show an offense committed in the town of Pennfield on the 28th of July, show subsequent acts as corroborating testimony, as they would have no such tendency. Proof of previous acts of sexual intercourse would tend to show a much greater probability of the commission of a similar act charged to have occurred subsequent thereto, but the converse of this

proposition would not be true, as the proof of a crime committed by the parties on a certain day could have no tendency to prove that they had, previous thereto, committed a similar offense."

In our efforts to reach a correct solution of both branches of this proposition we have been unable to find anywhere a more careful, correct and full review of all the cases upon this subject than is contained in the Lawyer's Reports Annotated, volume 62, pages 332 to 338. An analysis of the cases reviewed in such notes will demonstrate a careful and painstaking effort to correctly review all the cases upon the subject, and after a fair and thorough consideration of all the numerous cases pertaining to this subject the following clear and concise statement of the conclusions reached <sup>243</sup> is announced: "From the foregoing decisions it would appear that the weight of authority seems to be in favor of the doctrine that, in this class of cases, evidence of acts occurring prior to the act for which the accused is being tried may be given to characterize and explain the latter; but that evidence of subsequent acts may not. The minority in favor of the admission of subsequent acts, is, however, a strong one; but it is thought that the reasoning in favor of their admission lacks a great deal of the force of that generally used in the arguments in favor of the admission of evidence of prior acts."

2. This brings us to the consideration of the action of the court in overruling, at the close of the state's case, defendant's motion to require the state to elect as to which act of sexual intercourse as testified to by the prosecutrix it would present to the jury and rely upon for a conviction.

The prosecuting witness, as before stated, testified to numerous acts of sexual intercourse with the defendant prior to her arriving at the age of fourteen years. That each of said acts constituted a separate and distinct offense for which the defendant can be convicted, there can be no doubt, as we have heretofore pointed out, and it was manifest error on the part of the trial court to deny such motion, and this error is emphasized by the instructions of the court which failed to confine the jury to the consideration of any one particular act upon which a conviction might rest, but substantially directed the jury that they would be authorized to find the defendant guilty if they believed and found from the evidence that he had committed any or all of the acts embraced in the testi-

mony of the prosecutrix. The charge upon which the defendant was tried was embraced in but one count of the information, and simply charged but one offense committed on the 20th of October, 1903. Now, while under the law the state would <sup>244</sup> not be required to prove the commission of the offense upon any particular date, but had the right to establish its commission upon any date prior to the filing of the information, yet the defendant under this charge could only be convicted of one offense, and where the proof tended to show the commission of several distinct offenses, it was clearly the duty of the court to confine the consideration of the jury to but one of the offenses indicated by the proof, and the state at the close of its case should have been required to announce its election as to which one of the acts indicated by the proof constituting the offense charged it would rely upon for a conviction.

The supreme court of California is one of the courts which holds that prior as well as subsequent acts of the defendant are admissible in evidence, but in *People v. Castro*, 113 Cal. 11, 65 Pac. 13, in treating of the proposition now under consideration, that court expressly ruled that the defendant, where separate acts of intercourse were sworn to by the prosecutrix, should not be called upon to defend himself against each of these separate acts of intercourse extending through a period of several months; that the information charged only one act, and upon that election the case must stand or fall. It was further held in that case that while it was true that any one of the acts sworn to by the prosecutrix could have been selected by the state as the act charged in the pleading, yet the entire four acts could not be so selected, and it was expressly held in that case that, even conceding that there was a failure on the part of the defendant to request an election at the proper time, still, when the case went to the jury the court in some form should have directed their minds to some particular act of intercourse which it was incumbent upon the state to establish by the evidence before a verdict of guilty could be rendered against the defendant. This was not done in that case, and the judgment was reversed.

<sup>245</sup> In *State v. Acheson*, 91 Me. 240, 39 Atl. 570, the defendant was charged with an assault with attempt to ravish and carnally know a female child under the age of fourteen years. There was but one count in the indictment, and the offense

was alleged to have been committed on the third day of January, 1897. The proof tended to show four separate and distinct assaults. This evidence was received and remained in the case without any explanation of its limited tendency and purpose. The court in that case, in discussing this proposition, said: "In this state of evidence, the jury were instructed in the charge that if they were satisfied 'that on any date while this little child lived in the defendant's house he was guilty of this charge' it was their duty to convict him. This would have been a correct and appropriate instruction if only one assault had been proved. But as applied to the evidence of four independent assaults on different days, there is ground for apprehension that it was inadequate and misleading. Under this instruction and upon this evidence, some of the jury may have been satisfied that an assault was committed on one of the occasions specified, and others of an assault on a different occasion, and thus a verdict rendered without unanimity respecting either of the occasions described in the testimony. It is, therefore, the opinion of the court that the ruling admitting evidence of other similar assaults without explanation of its purpose and effect, and the foregoing instructions to the jury upon that state of the evidence must be deemed erroneous."

In *State v. Hilberg*, 22 Utah, 27, 61 Pac. 215, the trial court, as in the case at bar, did not require any election to be made and allowed the case to go to the jury upon several acts of intercourse which the testimony tended to prove. The appellate court in its opinion clearly demonstrates the error of such course. It was there said: "Such a course was calculated to confound and confuse the defendant in his defense. He was expected to meet one charge at a specified time, but was required to defend <sup>246</sup> against and meet six different acts occurring during a period of fourteen months, upon one of which the jury was asked to convict. Whether the jury united in a verdict upon each act, or some on one and others on another of the acts proved, is problematical. . . . No jury should be set to fishing or hunting for a charge which they are called upon to try. Such a course deprived the defendant of a fair trial, and compelled him, without warning, to defend against acts of which he had no notice. Manifestly, he could not be prepared to meet such confusing charges not contained in the information."



In the case of *People v. Williams*, 133 Cal. 168, 65 Pac. 323, the supreme court of California is very emphatic in its denouncement, in cases of this character, of not confining the jury to the consideration of one particular act. In the discussion of this proposition, the court said: "But one other matter requires notice at our hands. That arises from an instruction given by the court to the effect that, if the jury found that defendant had had sexual intercourse with the prosecutrix at any time within three years before the finding of the indictment, she being under sixteen years of age, etc., they must find him guilty. The prosecutrix testified that she lived with the defendant for a period of four months, and on nearly every day during that time, and sometimes five or six times a day, they had sexual intercourse with each other. In addition to this sweeping general assertion, many alleged acts were specifically described, with circumstances of time, etc. Each of these acts was a separate offense, and the defendant could be tried for either, and separately for each of them. The jury were not even told that they must all agree that some specifically described act had been performed. A verdict of guilty could have been rendered under such an instruction, although no two jurors were convinced beyond a reasonable doubt, or at all, of the truth of the charge as to any one of these separate offenses. <sup>247</sup> Even worse than that was possible. As to every specific offense which there was an attempt to prove, and which could be met by proof, the defendant may have established his defense, and yet upon the general evidence of continuous crime, which, in the nature of things, he could only meet by his personal denial, he may have been convicted. And how could he defend when he was not informed as to which particular offense, out of hundreds testified to by the prosecutrix, he was to be tried? Such a trial, upon a charge so indefinite as to circumstance of time and place, or any particular, except by the general designation, would be a judicial farce, if it were not something a great deal worse."

In this state it has been the uniform practice in the trial of criminal cases, where the proof on the part of the state tends to show the commission of separate and distinct offenses of the same class, to require an election at the close of the state's case upon which one of the offenses, as shown by the evidence, it will rely for a conviction, even as applicable to

misdemeanors. Judge Kelley, in his treatise on Criminal Law and Practice, section 1074, in treating of the misdemeanor of selling intoxicating liquors, announces the rule which has been approved by the courts of this state. He says: "When the indictment charges the selling in a general way, without specifying the person or kind of liquor involved in the sale, the state may call any witness or witnesses and prove an illegal sale; and if the court permits witnesses to testify as to separate and distinct acts or sales, the prosecutor should be required to elect upon which one he will rely, and be confined to his election, so that the defendant may know what he has to defend against on the trial, and plead the result in bar of another prosecution for the same act or sale."

We deem it unnecessary to pursue this subject further. It must be ruled that the action of the court in <sup>248</sup> denying the defendant's motion at the close of the state's case constitutes reversible error.

3. This brings us to the only remaining proposition arising upon the testimony of the prosecuting witness, which tends to show the commission of separate and distinct offenses. that is, as to the proper time when the election should be made by the state upon which act of sexual intercourse it will rely for a conviction. The record in this cause does not disclose that the appellant, at the commencement of the trial, or at any other time during the progress of the trial, until the state had closed its case, requested the court to compel the state to elect upon which act of intercourse it would proceed and rely for a conviction. It is insisted, however, by learned counsel for appellant that the prosecuting witness designating the time of the commission of the first act of intercourse in October, 1903, and her testimony tending to show that the offense was complete at that time, avoided any necessity for any request on the part of the defendant for an election, but the state having first introduced such proof, the law would imply an election of that particular act as the one upon which a conviction would be sought.

We confess that this contention of appellant is supported by the opinions of courts of high standing in other states: Such was the ruling in *People v. Jenness*, 5 Mich. 305; *State v. Acheson*, 91 Me. 240, 39 Atl. 570; *State v. Hilberg*, 22 Utah, 27, 61 Pac. 215; *People v. Williams*, 133 Cal. 165, 65 Pac. 323; *People v. Clark*, 33 Mich. 112.

It is difficult in cases similar to the one now before us to lay down an inflexible rule which should govern trial courts regarding the proposition now under discussion. We have heretofore indicated that it is the uniform practice in the courts of this state to require an election after the state has developed its case, and while it may be that other separate and distinct offenses <sup>249</sup> may be developed by the state and the defendant, as a matter of right, is entitled to have the state make an election as to the offense upon which it will proceed, yet in view of the uniform practice in this state, we are unwilling to say that under all circumstances the law would imply an election upon the proof tending to show the first act, which would constitute the offense, or that the state should be compelled at the commencement of the trial, before the introduction of any testimony, to announce its election. We are inclined to believe that the safer rule is that the court should act in accordance with the conditions confronting it at the time with the knowledge and information it may have or may acquire from the prosecuting officer at the time the trial commences. There are cases in which both the court and the prosecuting officer have but little information as to what the testimony of the state will develop. In cases of that character we are of the opinion that it would not tend to promote the fair administration of justice to embarrass the representative of the state by compelling him, in a case of which he had but little information, to elect upon what particular act he would proceed to trial, or by ruling that upon the introduction of proof tending to show the commission of some particular act, that was an election by implication; and, on the other hand, while the prosecuting officer, who is the representative of the entire people, which includes the defendant, should earnestly and vigorously prosecute all violations of the law, yet it is equally his duty to deal fairly with the defendant in the prosecution of the offense with which he is charged; and if in cases of this character it is made manifest at the commencement of the trial that he is entirely familiar with his case and thoroughly conversant with the testimony which he can introduce, which will show the commission of several separate and distinct offenses similar to the one charged, and the court, by the statement of prosecuting officer or otherwise, is informed that such will be the proof, then, <sup>250</sup> in our opinion, common fairness to the defendant would

require the prosecuting officer to announce his election of the particular act that he would go to the jury upon, and under those circumstances he ought not to be permitted to introduce testimony showing the commission of numerous separate and distinct offenses, with the view and purpose, by the use of those offenses shown to have occurred subsequent to the date of the act upon which he is finally required to elect to proceed, of prejudicing and inflaming the minds of the jury, and, as was said by the court of criminal appeals of Texas in the case of *Smith v. State*, 72 S. W. 401, "thereby convicting the accused on general principles."

As the judgment in this case must be reversed and the cause remanded for a new trial, while discussing this proposition it is not inappropriate to say that, upon the retrial, the state having in the present trial developed its case, common fairness to the defendant would suggest the propriety, upon the request of the defendant, of requiring the state to elect upon which one of the acts of sexual intercourse, as testified to by the prosecuting witness, it will rely for a conviction, and upon such election being made, as herein indicated, the evidence of prior acts of sexual intercourse may be introduced for the purpose of tending to show the commission of the act upon which the state has elected to base its case; and all acts of sexual intercourse subsequent to the date of the act upon which the state has elected to proceed should be excluded. This suggestion upon the subject of requiring the state to elect upon which of the offenses indicated by the testimony it will proceed to trial at the next hearing, finds full support in the able, clear and logical opinion by Chief Justice Parker, in *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73. There had been a former trial of that case, and Judge Parker, after pointing out certain errors calling for the reversal of the judgment, thus states the case and indicates the course that should have been pursued by <sup>251</sup> the court in the trial under review. He says: "As these errors call for a reversal of the judgment, we might not consider the case further were it not that the trial was conducted in distinct violation of the rights of the defendant in most important respects, and as the same course was pursued on the former trial to a certain extent, it seems to be our duty to guard against the repetition on the next trial of some errors most damaging in effect, which the defendant has had to meet on

the previous trials. The indictment charges the defendant with the crime of an act of sexual intercourse with a female not his wife under the age of sixteen years, and alleges in due form that the act constituting the crime was committed on the first day of July, 1892. The complainant says that the defendant had sexual intercourse with her on seven different occasions prior to her becoming of the age of sixteen years. Notwithstanding the fact that if all of said acts were committed they constituted seven distinct crimes, for only one of which defendant was or could have been charged in this indictment, the people were permitted on the former trial to prove all of these acts and the jury authorized to find the defendant guilty, provided they found he had committed any one of them. On the trial, which is the subject of this review, the court refused to follow the precedent thus set for it in one respect only; it did hold finally that the defendant could be convicted for only one offense, but that decision did not go far enough, as we shall see, nor was it made at the time that it should have been. The defendant was represented by skilled counsel, who, although having but a very short time for the preparation of the case, fully appreciated the difficulties that had unjustly been placed upon the defendant on the former trial to defend against seven distinct crimes where but one was or could have been charged, and so, at the very opening of the trial, by request to the court, and also to the district attorney in open court, by direct motion made and objection to evidence taken, the counsel presented in <sup>252</sup> almost every way conceivable to the court that the defendant was charged with but one crime, could be tried for but one, and was entitled to know at the very beginning of the trial whether he was to be tried for a crime committed on the date alleged in the indictment, and if not, then that the people should state the date of the crime which it was purposed to prove as the one charged in the indictment. But the district attorney protested that it was his right to prove as many similar crimes as he could and to submit any one he chose as the one charged in the indictment. The court sustained the position of the district attorney, and for seven days the taking of testimony on the part of the people proceeded, during the course of which twenty-one witnesses were called and testified to various outlying circumstances offered apparently in the hope that they might be in the end re-

garded as in some way corroborating the complaint as to some of the transactions detailed by her. A long, skillful and, at times, effective cross-examination had taken place, but without any knowledge on the part of the cross-examiner as to which one of the seven acts about which the complainant testified was to be submitted to the jury as the crime charged in the indictment. The people rested, and then the court offered to entertain a motion to compel the people to elect upon which one of the transactions it would stand. The motion was made; direction to the people given; selection made; and then just at the very moment when the defendant was obliged to put his witnesses on the stand in support of his defense he was advised, and for the first time, for what particular crime his conviction was to be asked at the hands of the jury." It was finally ruled under the circumstances in that case that the action of the court in not compelling an election until after the close of the state's case was erroneous and without support either in principle or authority.

Having indicated our views upon the main propositions disclosed by the record, and as it results in the <sup>253</sup> conclusion that a new trial must be had of this cause, it would perhaps be well to briefly suggest our views upon some of the remaining complaints of appellant. Appellant complains of the exhibition of the child that the prosecuting witness testifies was the result of the intercourse she had with defendant. It is sufficient to say of this complaint that we are of the opinion that the prosecuting witness had the right to testify that she became pregnant and gave birth to a child as the result of the intercourse she referred to, and if she has the child in the courtroom, we see no impropriety nor valid objection to her pointing it out and saying, "That is the child I gave birth to as the result of such intercourse."

It is also insisted that the court erroneously admitted the testimony of Dr. Crawford, in which the doctor undertook to identify by a memorandum in a book that he kept the fact of attending prosecutrix's mother at the time she gave birth to the prosecutrix, and thereby fix the date of the birth of the prosecutrix. It is sufficient to say of this complaint that unless the testimony of the doctor is sufficient to indicate that he was in fact in attendance upon the mother of the prosecuting witness at the time of the birth of such witness, and sufficiently identifies the parties concerned, then his testimony

should be excluded; but, on the other hand, if his testimony tends to establish that he attended the mother of the prosecuting witness at the time she gave birth to such witness, and he is enabled, by refreshing his memory from a memorandum-book, to reasonably fix the date of such birth, then such testimony is admissible.

This leads us to the consideration of the only remaining complaint which we deem necessary to give any attention to, that is, that the court refused to give, at the request of the defendant, the following instruction:

"The court instructs the jury that, under the laws <sup>254</sup> of this state, it is made the duty of the party ravished to make complaint of such ravishment immediately or as soon after such alleged ravishment as an opportunity can be had to do so. The court instructs the jury that the state has failed to make any proof of any such complaint by the prosecutrix, Florence Widdicombe, in this case. Now, if the jury shall believe from the evidence that said Florence Widdicombe had opportunity to make such complaint and failed to do so, then such failure to do so is inconsistent with the defendant's guilt and renders the charge of rape upon her by defendant improbable."

This instruction has no application to this case, and was properly refused by the court. The defendant is charged by the information with statutory rape, that is, with having carnal knowledge of a female under the age of fourteen years, and force or violence in accomplishing the act charged in the information constitutes no element of that offense, and the prosecuting witness may have consented to the act and sought to conceal it, yet such facts would in no way lessen or change the grade of the crime. The instruction requested by the defendant has application alone to that class of cases where, in order to constitute the offense, the act of sexual intercourse must be accomplished by force and violence and against the will of the female charged to have been ravished. While the prosecutrix in this case does say that the sexual act was accomplished by force, yet that testimony had absolutely nothing to do with the establishment of the guilt of the defendant of the offense charged, and in no way alters the nature and character of the offense charged. While it may be legitimately argued to the jury as affecting the weight to be attached to her testimony as to the act of sexual intercourse,

still as a matter of law it is immaterial whether such act was accomplished with or without force, or whether she made or failed to make any complaint of the accomplishment of such act. We repeat that the <sup>255</sup> action of the court in refusing the instruction requested was entirely proper as applicable to this case.

We have indicated our views upon the controlling questions disclosed by the record, which results in the conclusion that the judgment of the trial court should be reversed and the cause remanded for a new trial in accordance with the views herein expressed, and it is so ordered.

All concur.

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*The Admissibility of Evidence of Prior and Subsequent Crimes* in criminal prosecutions is discussed generally in the note to *Sykes v. State*, 105 Am. St. Rep. 976. This question is further discussed with reference to the crime of rape in *Smith v. State*, 44 Tex. Cr. Rep. 137, 100 Am. St. Rep. 849; *Barnett v. State*, 44 Tex. Cr. Rep. 592, 100 Am. St. Rep. 873; *People v. Abbott*, 97 Mich. 484, 37 Am. St. Rep. 360; *Manning v. State*, 43 Tex. Cr. Rep. 302, 96 Am. St. Rep. 873.

*A Child Whose Paternity is in Issue* may be exhibited to the jury in prosecutions for rape, seduction, or bastardy: *State v. Danforth*, 73 N. H. 215, 111 Am. St. Rep. 600; *State v. Saidell*, 70 N. H. 174, 85 Am. St. Rep. 627; *State v. Horton*, 100 N. C. 443, 6 Am. St. Rep. 613; note to *Weatherford v. Weatherford*, 56 Am. Dec. 218.

*The Prosecution Should be Required to Elect* upon which offense it will go when the evidence upon a charge of keeping a house of ill-fame shows the keeping of different houses of that character within the same town: *State v. Plant*, 67 Vt. 454, 48 Am. St. Rep. 821. See, too, *State v. Fitzsimon*, 18 R. I. 236, 49 Am. St. Rep. 766.

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## BUCHER v. HOHL.

[199 Mo. 320, 97 S. W. 922.]

**ATTORNEY AND CLIENT—Acquisition of Property by Attorney.**—If, in an action for divorce by a wife, the defendant makes no appearance and the decree is by default while the plaintiff is the owner of real estate, which has been conveyed by her husband to a third person and reconveyed to her with nothing to impeach the validity of such conveyances, and if in the divorce action plaintiff's attorneys represented to her that defendant was contesting the case and that the best they could do for her was to obtain a part of such land for her, and a decree was entered giving a part thereof to her and the remainder to her husband, whereupon execution was issued upon a judgment against him, and at a sale thereunder plaintiff's attorneys purchased such land, they will not be allowed to retain



it, for by such purchase they acquired no rights against their client. (p. 495.)

**ATTORNEY AND CLIENT—Illegal Acquisition of Property.**—If attorneys for a wife in divorce proceedings improperly secure a decree dividing property belonging to her, between herself and her husband, and the evidence shows a case of implicit trust and confidence by her in her attorneys, her acquiescence in such decree cannot avail her attorneys to their advantage and to her detriment. As to them she is not estopped from claiming her property. (p. 496.)

**LIMITATIONS OF ACTIONS—Married Women.**—If the owner of property is a married woman at the time possession thereof is taken by a third person, the statute of limitations does not run against her during her coverture. (p. 496.)

**ATTORNEY AND CLIENT—Unlawful Acquisition of Property—Estoppel.**—If attorneys illegally obtain title to land owned by their client, the client's subsequent recognition of their title is not binding on him, where the evidence shows a case of implicit trust and confidence by him in such attorneys. (p. 497.)

**LACHES—Stale Claims—Equity.**—The defense that a claim is stale is purely an equitable one, and unless there is some natural justice back of it a court of equity will not entertain it. (p. 497.)

**QUIETING TITLE—Mode of Relief.**—If, in a suit to quiet title, it appears that attorneys have improperly and illegally acquired title to the land of their client, and that the purchaser from them knew all of the facts and the manner in which they acquired such title, he is not altogether an innocent purchaser, and should be required to settle with the client, instead of his grantors, for the purchase price of the land, and derive his title through such settlement. (pp. 497, 498.)

W. A. Kennedy, Mooneyham & Gregory, and A. T. Brewster, for the appellant.

E. J. Bean, for the respondents.

**325 VALLIANT, J.** This is a suit to quiet title to seventy-five acres of land in Jefferson county. The trial in the circuit court resulted in a finding and judgment for the defendants, from which judgment the plaintiff has appealed.

Both parties claim title derived from John Mabee, who, it is agreed, owned the land in 1880 and on down until it passed either to the plaintiff in 1881, or to defendants in 1884.

April 5, 1881, plaintiff was the wife of John Mabee; on that day John Mabee and wife conveyed a tract of one hundred and twenty acres, of which seventy-five acres in suit were a part, by warranty deed, to Elizabeth M. Simon for the consideration, as expressed, of two thousand seven hundred dollars, and on the same day Elizabeth M. Simon, for the same consideration, as expressed, by warranty deed conveyed the one hundred and twenty acres to the plaintiff. These deeds were duly recorded, and they constitute the plaintiff's title.

In January, 1884, plaintiff brought suit against <sup>326</sup> her then husband, John Mabee, for divorce, praying also for alimony. Mabee, being then a nonresident, was given constructive notice of the suit by publication; he made default, the plaintiff obtained a decree of divorce, and in the same decree it was adjudged that she should have as for her alimony one-half, according to value of the one hundred and twenty acres, and commissioners were appointed to make partition of the same, which was done, setting apart to her husband the seventy-five acres now in suit, and to her the remaining forty-five acres, which contained the improvements. Plaintiff went into possession of the part allotted to her, but Mabee never appeared to take possession of the part set off to him; if he ever heard of it the record does not show it. In 1884 a judgment was rendered against Mabee in the circuit court of that county for about four hundred dollars, in favor of certain parties strangers to this record, execution issued, and under it the sheriff sold the seventy-five acres in question as the property of Mabee, and executed to the purchasers a sheriff's deed therefor. That is the title under which defendants claim.

Thus it will be seen that as the title stood on the record at the date of the decree of divorce, the plaintiff was awarded one-half of her own land for her alimony, and the rest was by the decree given to her husband, she seeks now to have a decree vesting the title in herself to that part of her land which was given to her husband, alleging that the decree in that respect was obtained by fraud.

The following appears from the defendants' evidence: The attorneys for the plaintiff in the divorce suit had been attorneys for Mabee in a suit filed by him to the September term, 1881, to set aside the deeds of April 5, 1881, from Mabee and wife to Simon, and from Simon to plaintiff, which suit, after having been instituted, was voluntarily dismissed. To the same term of court Mabee, by the same attorneys, brought suit against this plaintiff, his then wife, for divorce, which <sup>327</sup> suit Mabee also voluntarily dismissed. Afterward Mabee became a nonresident of the state, the plaintiff still residing in Jefferson county, and in 1884 she employed these same attorneys to bring suit for her against Mabee for divorce on the ground of abandonment, which they did, and it was through their instrumentality in that suit that the divorce above mentioned

was obtained, along with a decree giving her one-half of her own land as alimony. And thereafter in January, 1885, when the seventy-five acres so allotted to Mabee were sold under execution against him, these same attorneys were present and became with another the purchasers, and took the sheriff's deed, and in 1890 the other conveyed his interest to them. In 1891 these attorneys sold and conveyed the land to their codefendant Hohl, taking back from him a deed of trust to their codefendant Moss as trustee to secure the payment to them of the note given for the purchase money, seven hundred and fifty dollars, which they still hold, nothing having been paid on it but the interest; they are codefendants with Hohl in this suit, seeking to maintain their title under that deed of trust.

There is not in this record the suggestion of one single fact going to impeach the validity of the deeds from Mabee and wife to Simon, and from Simon to plaintiff of date April 5, 1881. True it is, the attorneys testified that after investigation they were satisfied that those deeds could not be sustained, but they stated no fact on which to base such opinion, and the opinion itself was given in the face of the fact that Mabee himself, while acting under their advice, voluntarily dismissed his suit brought to set the deeds aside, and that he finally abandoned his wife and moved to another state.

An attorney cannot acquire title to his client's property in this state under the circumstances above stated: Aultman, Miller & Co. v. Loring, 76 Mo. App. 66; Davis v. Kline, 96 Mo. 401, 9 S. W. 724, 2 L. R. A. 78; Eoff v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609, 18 S. W. 907.

Under the undisputed facts as above stated there <sup>328</sup> can be no doubt of the plaintiff's right to have back from her attorneys the interest that they hold in that portion of her land which was improvidently decreed away in the divorce suit unless she is estopped from asserting her right by acquiescence in the decree, or has slept so long that her suit has become stale, or she is barred by the statute of limitations, or there is an innocent purchaser for value whose rights a court of equity ought to protect.

We will first consider these features of the case as they bear on the rights of the plaintiff as against the defendants, who were her attorneys.

The plaintiff testified that from the time she brought the divorce suit until just before this suit was brought she never consulted any other attorney, and that she trusted entirely to her attorneys in that suit; that while the suit for divorce was pending one of these attorneys told her that "they [meaning her husband and his friends] were fighting me hard, but that he [the attorney] was doing the best he could for me"; and that after the decree he came to see her with the men who were appointed to divide the land and told her that that was the best he could do for her. The attorney himself on that point testified to substantially the same effect; he said: "I told her I doubted her being able to get a divorce if they fought her, and I advised her that I didn't think she could hold the property; I told her they might let her off with part of the property and take a divorce." The divorce decree was by default. One of the attorneys testified that Mabee was "a little bit of a fellow and a sort of an imbecile"; that after he left the state an uncle of his came to look after his affairs and that it was with this uncle that they (the attorneys) agreed on the terms of the divorce decree. There was some evidence for defendants to the effect that in the petition for divorce it was stated that the plaintiff was without means and that Mabee was in possession of the one hundred and twenty acres; but the papers in that <sup>329</sup> case were lost and no one attempted to state with certainty what the contents of the petition were except that the application for divorce was based on abandonment. Plaintiff testified that she never knew what the petition contained. But as between the plaintiff and her attorneys in that suit the latter were more responsible than she for the statements in the petition.

The evidence shows only a case of implicit trust and confidence in her attorneys, and if she acquiesced in that decree it was because her attorneys told her it was the best that could be done for her. Under those circumstances her attorneys cannot avail themselves to their advantage and to her disadvantage of her acquiescence; as to them she is not estopped from claiming her own.

As to the plea of the statute of limitations the evidence for the defendants does not show that they took possession of the land as soon as they bought at the sheriff's sale. It was not at that date improved, the improvements were all on the forty-five acres set off to plaintiff, and as to the seventy-

five acres set off to Mabee there was no actual possession then taken. The witness in his own behalf on that point said: "I tried to get somebody to go onto our part of it and exercise the right of ownership over it. She [meaning the plaintiff] married Mr. Bucher about that time, and I rented the property to them; they lived there two or three years. They had the property right along until we sold it to Mr. Hohl."

In so far as that testimony is intended to show a recognition by the plaintiff of the title her attorneys acquired to the land, it must be taken in connection with what has been above said on the subject of her acquiescence in the decree that gave her husband half of her land in the divorce suit while he in his own behalf was making default and claiming nothing.

The significance of that testimony, however, as it bears on the question of the statute of limitations is <sup>330</sup> that it shows that at the time the defendant's actual possession began the plaintiff was a married woman; therefore, the statute of limitations did not begin to run against her.

As to the staleness of the plaintiff's claim this is to be said: The defense that a claim is stale is purely an equitable one, and unless there is some natural justice back of it a court of equity will not entertain it.

But the title of the defendant Hohl rests on a better foundation than that of his codefendants from whom he purchased, although when he purchased he was not altogether ignorant of the title of the plaintiff. Hohl's wife and the plaintiff and Miss Elizabeth Simon, who was the medium of the conveyances of April 5, 1881, were sisters, and he had knowledge of the transaction and knew that the plaintiff had acquired title by those deeds. But he was not responsible in any degree for the decree in the divorce suit and, without notice to the contrary, he would have a right to presume that the title as declared by that decree was binding on the parties to the suit.

The statute of limitations has not run in Hohl's favor, because when he went into possession in 1891 the plaintiff was a married woman and has since so continued. But as to him the plea of estoppel has more force. The plaintiff saw him go on the land and make valuable improvements, clearing land, building houses, fences, etc., as he says to the extent of two thousand five hundred dollars value, and so continued for more than ten years. Under those circumstances, no just ground

appearing to question his good faith, equity will hold that the plaintiff, married woman though she be, and beyond the reach of the statute of limitations, ought to have awakened sooner to her rights and have asserted them before Hohl had spent his time and labor and money improving the land. As to him she should not now be heard to claim the whole seventy-five acres in suit. Still Hohl is not altogether innocent. He had notice of the plaintiff's title under <sup>331</sup> the deed of 1881, and he knew that his codefendants from whom he purchased were her attorneys in the divorce suit, and that their only title was the sheriff's deed under the execution against Mabee. It will not, therefore, be inequitable to require him to settle with her instead of her attorneys for the purchase price of the land and derive his title through such settlement.

The judgment is reversed and the cause remanded to the circuit court of Jefferson county, with directions to enter a decree divesting the defendants of all title to the seventy-five acres of land described in the petition, and vesting the same in the plaintiff subject to the right of the defendant Hohl to at any time within six months of the date of the decree pay to the plaintiff the sum of seven hundred and fifty dollars and interest at six per cent per annum from the date of the filing of this suit, and that upon making such payment the title to said land to revert in him, the said Hohl, free of all claims of the parties to this suit, and that defendants pay the costs in the circuit court.

All concur.

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*In View of the Confidential Relations Between Attorney and Client*, transactions between them are often declared voidable which would be deemed unobjectionable between other parties: *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401; *Cassen v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160. As to the validity of a deed acquired by an attorney to his client's land, see *Cunningham v. Jones*, 37 Kan. 477, 1 Am. St. Rep. 257; *Eoff v. Irvine*, 108 Mo. 378, 32 Am. St. Rep. 609.

*The Statute of Limitations* does not begin to run, in some states, against married women during coverture: *Alsop v. Jordan*, 69 Tex. 300, 5 Am. St. Rep. 53; *Johnson v. Edwards*, 109 N. C. 466, 26 Am. St. Rep. 580.

*Estoppel Against Married Women* is the subject of a note to *Trimble v. State*, 57 Am. St. Rep. 169.

ST. LOUIS, MEMPHIS AND SOUTHEASTERN RAILROAD COMPANY v. AUBUCHON.

[199 Mo. 352, 97 S. W. 867.]

**EMINENT DOMAIN—Effect of Payment and Acceptance of Award of Damages.**—If commissioners appointed to assess a land owner's damages arising from the appropriation of a right of way through his land have fixed the amount and the railroad company excepts to such award, but subsequently pays the amount into court and takes possession of the right of way, and the land owner accepts the amount of the award in money, the railroad company is not thereby estopped to further litigate with such land owner the amount of the damages. (p. 500.)

**WITNESSES—Power to Limit Number of.**—A rule of court arbitrarily limiting the number of witnesses on each side to four in a damage suit, upon the issue of damages or no damage, cannot be defended. It is both unreasonable and arbitrary. (p. 502.)

**EMINENT DOMAIN—Independent Tracts.**—If there are two or more independent farms held by separate chains of title, that have been subjected to an independent and distinctly separate use, in condemning a strip of land off of one of them under the right of eminent domain, the other farm or farms, though belonging to the same owner, are not to be considered in estimating damages. (pp. 513, 514.)

L. F. Parker and J. G. Egan, for the appellant.

Pipkin & Swint, for the respondent.

<sup>357</sup> LAMM, J. On October 25, 1901, Narcissus A. Aubuchon purchased a parcel of land described as all of fractional section 11, township 39, range 7 east, containing fifty-six and ninety-nine hundredths acres lying in Ste. Genevieve county, for two thousand dollars, and entered into possession. Thereafter, on September 5, 1902, the St. Louis, Memphis and Southeastern <sup>358</sup> Railroad Company commenced proceedings in the circuit court of said county to condemn a right of way for a standard gauge railroad through said tract for a distance of three thousand one hundred and forty-five feet, taking therefor a strip one hundred feet wide, containing seven and two thousandths acres of land. On October 11th, commissioners, duly appointed and qualified, reported Aubuchon's damages at seven thousand dollars, and further reported that plaintiff company should construct a twelve-foot "under-road" crossing for Aubuchon in mitigation of damages claimed. This report was filed October 13th. Plaintiff company paid into court said award, and in due time filed exceptions to the commissioners' report. Thereafter Aubu-

chon accepted and took down the seven thousand dollars, and thereafter the court granted a jury trial on the exceptions of plaintiff, to reassess the damages, and the plaintiff company took possession of the strip to construct its railroad.

Before the assessment of damages by the jury, Aubuchon filed a motion to strike plaintiff's exceptions from the record, which motion was based on the theory that plaintiff had paid into court the said damages and afterward took possession of the right of way, and Aubuchon had received the said sum and did not himself except to the report, but accepted the provisions thereof as a final adjustment of the matters set out in plaintiff's petition, and, therefore, the court had no further jurisdiction over the subject matter of the action. This motion was overruled, and Aubuchon excepted to the ruling. The jury awarded Aubuchon eight thousand dollars damages; and from a judgment upon that verdict, plaintiff after due steps appeals.

1. The first question presented is whether the tender into open court of the commissioners' award, seven thousand dollars, and its subsequent receipt by Aubuchon resulted in making the matter a finality and subsequent steps of no account.

Defendant's learned attorneys present an ingenious constitutional argument in favor of their view, and <sup>359</sup> it may be conceded that, if the question was *res nova*, much might be said, and well said, on that theory. That was the view entertained by the St. Louis court of appeals in 1884: *State v. Lubke*, 15 Mo. App. 152.

But the whole matter was under exposition and elaborately considered in *Rothan v. St. Louis etc. R. R. Co.*, 113 Mo. 132, 20 S. W. 892, and in *St. Louis R. R. Co. v. Clark*, 119 Mo. 357, 24 S. W. 157. The constitutional provisions relating to the exercise of the right of eminent domain, the right of trial by jury on the damages assessed, and the statutes enacted to give effect to these constitutional provisions, were expounded in those cases, and the conclusion arrived at was adverse to the present contention of respondent. Those cases have been taken as settling this question in this state, whatever may be the rule elsewhere, and they have been followed: *St. Louis etc. R. R. Co. v. Donovan*, 149 Mo. 93, 50 S. W. 286; *State v. Fort*, 180 Mo. 97, 79 S. W. 167; *St. Louis etc. R. R. Co. v. Roberts*, 187 Mo. 309, 86 S. W. 91.



Accepting their authority without re-examining or seeking to disturb the reasoning upon which they rest, it must be held that plaintiff was entitled to deposit the amount of the award in court, and thereby become entitled to take possession of the strip and go on with its work, without losing its right to further litigate with defendant the amount of damages.

For constitutional purposes (sec. 21, art. 2; sec. 4, art. 12) the award of the commissioners (until disturbed) was, *prima facie*, the just compensation to which defendant was entitled before his property was taken. But for statutory and final purposes, just compensation is flexible enough to mean, and does mean, the final amount awarded by a jury on a fair trial (Rev. Stats. 1899, secs. 1266, 1268), and defendant may not preclude plaintiff's right to litigate the question of damages by accepting the commissioners' award and putting the money in his pocket.

<sup>300</sup> The point must, therefore, be ruled against defendant.

2. Plaintiff assigns error in the exclusion of testimony—the point arising *nisi*, in this way: Having introduced three witnesses on the question of damages, the trial court, during the examination of the third witness on behalf of plaintiff, announced a rule to the effect that each side would be allowed only four witnesses on that issue, and applying the rule to the then condition of plaintiff's proof, allowed only one other witness to plaintiff on that issue. Plaintiff tendered other witnesses on that issue, but they were excluded. Plaintiff excepted to the rule when announced and excepted to its application when made. Subsequently, defendant, while putting in his case, tendered several witnesses in excess of the number prescribed, but they were not allowed to testify, and the defendant excepted. Defendant, however, took no appeal and filed no bill of exceptions and, though the ruling was to the mutual dissatisfaction of both parties litigant, yet defendant's discontent was apparently allayed by the verdict, whereas plaintiff's seems to be inflamed thereby. Thus is *Beaumont & Fletcher's dictum in Love's Cure* (Act III, Sc. 2) shown to be well grounded, viz.:

What's one man's poison, signor,  
Is another's meat or drink.

Was the ruling below right? We think not. The issue of damages was the main issue in the case. That trial courts

are allowed a discretion ought not to be gainsaid. The most irritating and unjustifiable delays would arise if trial courts had no discretion, were left to the volatile caprice of counsel alone.

On collateral and incidental issues, as for example the general reputation of a witness, or an issue upon a motion for a change of venue, or for costs, etc., it is a wise and a settled rule to allow trial courts wide discretion; and error predicated upon the exercise of such <sup>361</sup> discretion should be palpable and manifest to be held prejudicial.

Nor will we lay down any hard-and-fast rule circumscribing the power of trial courts, in the economy of time and dispatch of business, to put some reasonable bounds on the introduction of witnesses on a main issue in a civil suit; especially so where the evidence on a single point is not controverted, or where it is distinctly cumulative in quantity and quality. But evidently the matter should be approached with caution, and an arbitrary rule allowing four witnesses to a side in a damage suit upon the issue of damage or no damage cannot be defended. Much less can it be defended when the rule is made and applied (as here) after three witnesses have been placed upon the stand by one party. Picking and choosing become a vital matter under such rule, and even-handed justice requires that both parties have fair forewarning and the full privilege to pick and choose. This privilege was denied plaintiff, and thereby defendant had a distinct advantage; because, after the rule, plaintiff had but one choice, while defendant had four.

But, on principle, the rule was arbitrary and, we think, unreasonable. Defendant's damage might be composed of many elements, and one witness might be qualified on one element and another witness on another. Not only so, but there is a great difference between witnesses, and counsel, however wisely they may select, may ride to a fall on a given witness. His manner may be disappointing on the witness-stand, his capacity to tell what he knows may have been miscalculated, his voice may lack a note of sincerity, he may not stand the fire of a searching cross-examination, a yawn, a furtive glance of the eye, a shrug of the shoulders, impatient or impertinent remarks, a foolish reason given, or any one of many other supposable lapses or inadvertences may destroy or weaken the value of human testimony, and neither court

nor counsel have <sup>363</sup> the prescience to say in advance that justice will be met by an arbitrary assignment of four witnesses to a side on a controverted question of damages in a cause that would sustain a verdict of eight thousand dollars.

We are cited to no case by respondent that sustains such rule. In fact, the theory suggested by respondent upon which the assignment of error should be disallowed is that the motion for a new trial does not cover the point, but we do not read and construe the motion that way, and we think, on both reason and authority, error was committed in making and applying that rule in this case.

In one reported case, involving damages under the exercise of the right of eminent domain (Chicago etc. R. R. Co. v. Baker, 102 Mo. 553, 15 S. W. 64), "sixty odd witnesses were introduced"—the phrase "odd witnesses" in that instance (though not always) referring to number rather than to singularity.

The jury are the sole and exclusive judges of the weight of the testimony; with that the trial court has nothing to do during the trial. If, then, the trial judge may, without any cause shown, project his will arbitrarily into the number of witnesses on the crucial point in the case, he may by that token entirely foreclose the weight of evidence, and thus indirectly do what he may not directly do, to wit, interfere in a realm where the jury reign supreme; and while we would not want to say that a trial judge must supinely and indefinitely sit with folded arms to hear a cloud of witnesses spin out evidence upon the same point, yet there was no such threatened abuse in this case, and the precedent established by the learned judge, nisi, ought not to be sustained.

There may be conflict in the authorities, but the weight of judicial opinion and the quality of reasoning advanced therefor lie with the view herein expressed: Galveston etc. R. R. Co. v. Matula, 79 Tex. 577, 15 S. W. 573; Nelson v. Wallace, 57 Mo. App. 397; Markham v. Herrick, 82 Mo. App. <sup>363</sup> 327; White v. Hermann, 51 Ill. 243, 99 Am. Dec. 543; Green v. Phoenix Mut. L. Ins. Co., 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576; Village of South Danville v. Jacobs, 42 Ill. App. 533; Crane Co. v. Stammers, 83 Ill. App. 329; Cooke Brewing Co. v. Ryan, 98 Ill. App. 446; Barhyte v. Summers, 68 Mich. 341, 36 N. W. 93; Ward v. Dick, 45 Conn. 235, 29 Am. Rep. 677; Perkins v. Rice, 187 Mass. 28, 72 N. E. 323.

3. As the cause must be reversed and remanded because of the error pointed out in paragraph 2 of this opinion, it becomes necessary to consider another assignment of error we deem well made, and which error should be avoided on a retrial.

The consideration of the point now in mind cannot proceed intelligently without uncovering certain material facts. Thus: Fractional section 11, through which the railroad runs, may be called the Wallace tract. In 1853 there was a small stream emptying in the Mississippi river from the Missouri side called Isle Au Bois, the mouth of which was in section 3 of the same township and range as the Wallace tract, and a mile or a mile and a half north thereof. At that time there was a small island in the Mississippi river opposite the mouth of Isle Au Bois creek, and there was no island whatever opposite the Wallace tract. The chain of title under which defendant held the Wallace tract described the same, in some of its links, as being "on the Mississippi river." At the present time there is an island in the Mississippi river opposite the Wallace tract which projects north of that tract a good ways, the south end being about opposite the south side of the Wallace tract. In 1895 defendant (who lives elsewhere) acquired this island and ever since has owned and cultivated the same through tenants. He bought the island for three thousand five hundred dollars, and holds title thereto under two deeds of conveyance. Under one deed the description is as follows: "The undivided one-half of a certain island in the Mississippi river opposite the mouth of creek called Isle Au Bois situate partly in section 3, township 39 north, range 7 east, containing at the time <sup>364</sup> of survey thirty-two and ninety-two hundredths acres, and also all the accretions to said island, which includes what is known as Lee's and Ames' islands, containing in all seven hundred acres, more or less" in Ste. Genevieve county, Missouri. The description in the other deed runs the same.

As we understand the case, defendant holds title to said land in the Mississippi river opposite the Wallace tract as accretions to the little island shown on the government survey at the mouth of the Isle Au Bois. Whether the original island is still in existence or has been washed away is not shown by this record, nor does it matter. That the accretions aforesaid would not, and did not, inure to the benefit

of the riparian owner, but were held in a strictly technical sense as accretions to an island, as such, is somewhat shown by the fact that when Wallace, the former owner of the shore land, asserted a right to possession of a certain portion of the land adjacent to him in the river, his right was denied by defendant and he was arrested for interfering with defendant's possessory rights. Having held these accretions as an island (i. e., a piece of land surrounded by water) from 1895 down to September, 1901, defendant, as said, purchased the Wallace tract on the west bank of the Mississippi and, when plaintiff sought to condemn a right of way through the Wallace tract a few months later, he then insisted that the accretions theretofore purchased and held as an island were now, in point of fact and in effect, a part of the main shore, and that, by his purchase of the Wallace tract, the island and the Wallace tract became one entire tract for the purposes of assessing his damages.

The Wallace tract, prior to his purchase and down to the time of the condemnation proceedings, had the appurtenances and characteristics of a small and independent property. There was a little orchard, a perennial spring that overflowed in high water, a strip of a few acres of tillable second bottom, a refrigerating <sup>365</sup> cave or "cooler" for milk and suitable for preserving fish or storing fisherman's supplies, pigpens, a little garden and two old and indifferent log houses fit and used for human habitation. These houses in former times were occupied by the then owner of the Wallace tract and his tenants. At the time in hand one of them, as we gather it, was occupied by a tenant of defendant cropping on the Wallace tract, and the other was occupied by a tenant cropping on the island.

Further referring to the Wallace tract, hard by the river was a strip of bottom land that overflowed. Next, on the west, came a narrow bench of second bottom, as aforesaid, above flood water. Next to that, on the west, was a rocky bluff, at some places one hundred feet high. A ravine broke this bluff, and at one place widened so as to make a sheltered nook of two or three acres protected on three sides from the winds of winter. Much the greater portion of the Wallace tract lay on and back of the bluff and was broken and untillable, though timbered and suitable for grazing.

Defendant's island had two hundred acres of tillable land above high water. At ordinary stages of the river there was considerably more cultivating land. There were also bottoms on this island that overflowed. At other places willows grew, and there was also pasturage thereon. The island was divided into fields by fences, and there were houses thereon occupied by tenants.

Defendant grew corn on the island and fed and wintered cattle thereon, and shipped cattle and corn from the island on steamboats, there being a boat landing provided. The evidence indicated this was the usual shipping point for cattle raised and fed on the island and grain grown thereon. However, there was an interior market now and then at the mines, for instance, Mine LaMotte, and sometimes cattle were driven by defendant there.

Defendant owned, with one Priester, a tract of ~~300~~ land north of the Wallace tract, and there was a road leading to the river through this latter tract to a ford, and at this ford plaintiff maintained a ferry-boat.

At very dry times, the water fell so that one could pass to and from the Wallace tract to the island, at least in places dry-shod. At certain other times, the water there was fordable, the bottom of the channel being sandy. At other times the river reasserted sovereign rights of that portion of the channel, and communication with the island was cut off from the Wallace tract, except by the ferriage aforesaid. When the water was up and covered the low bottom on the Wallace tract and on the adjacent side of the island, i. e., from high bank to high bank, the river was from one hundred to two hundred yards wide. At low-water mark, as said, the bottom of the channel was bare (at least in places), and it seems that the portion of the channel between the Wallace tract and the island and running on up north was locally called a slough, and the bed of this slough from the low land on the island to the low land on the Wallace tract was from fifty to one hundred feet wide.

Defendant testified that he bought the Wallace tract to use in connection with the island. His idea was to use the protected feed lot, as he called it, on the Wallace tract, lying in the little ravine spoken of, to feed cattle which at other times ran on the island, to be watered at said spring. Up to the

time of the condemnation, no barns or sheds had been built, nor had any other steps been taken or improvements made to appoint a feed lot there for his island cattle. No crops raised on the island or hay or fodder were usually taken to this sheltered spot or to the Wallace tract and used for feed, or if so taken at all it was only in isolated instances. The Wallace tract could support a few head of cattle by itself, and about that number were fed and wintered there by defendant in the winter of 1901.

The projected right of way ran partly on the low bottom, but mostly on the second bottom of the Wallace <sup>367</sup> tract. At some places there were cuts; at others, fills. At one place the roadbed came to grade. The right of way destroyed the cooler or cave and one log house, and, we believe, the orchard. It ran between the improvements on the Wallace tract and the aforesaid spring, and took, as said, seven and two thousandths acres of land.

On this record it is contended by plaintiff that the island tract should not have been taken into consideration in assessing damages for taking a strip of the Wallace tract. In other words, plaintiff contends the two tracts were distinct, and made so by nature in that a portion of the Mississippi river flowed between. Plaintiff further contends that in a fair sense these two tracts were not subject and put to a joint use; that they did not lie contiguous in contemplation of law; and that defendant's feed lot on shore, serving as a foundation upon which to build an airy fabric of damages to his island possession, had no real basis in fact or market value in so far as it is taken in connection with the island. Defendant, on the other hand, contends that the island and shore land were one tract, jointly used as such; that plaintiff's right of way cut off the shore feed lot from the island; that the interference with such feed lot, and access therefrom to the spring, injured his island possession, as well as the Wallace tract itself.

It is apparent from the amount of damages allowed by the jury and from the instructions of the court that by far the principal element in defendant's damages is based on the theory of injury to that portion of his real estate lying in the Mississippi river; because, not only did the direct evidence show the damage to the Wallace tract was a few hundred dol-

lars, but of significance in this behalf is the fact that the shore tract cost two thousand dollars, and the evidence showed it was not worth more than that by itself. The island tract, six or seven years before, cost three thousand five hundred dollars, making the cost of both tracts five thousand five hundred dollars. Now, no valuable or permanent subsequent improvements are shown to enhance the value, <sup>368</sup> so whatever rise in values existed must be referred to a rising market for real estate. And, considering this, it will be seen that the damages allowed exceeded the total cost of both tracts by two thousand five hundred dollars; so that, if both tracts had been wiped out of existence, defendant would (by his eight thousand dollars verdict) be paid his original cost and two thousand five hundred dollars profit in rise of value; yet the fact is, defendant has left his island tract precisely as he bought it and used it, and has further left nearly fifty acres of the Wallace tract, the latter, however, in a concededly damaged condition.

At the hearing plaintiff vainly sought to exclude all evidence pertaining to defendant's island possession, and saved its exceptions to the rulings of the court. At the close of the whole case it asked an instruction having the same purpose in view. This instruction was refused, and it excepted. Did the court commit error in so ruling? We think so, because:

The correct answer to the foregoing question depends upon the answer to another, viz., were defendant's island and the Wallace tract two separate and distinct farms? Or, were they one body of land or plantation—in effect, contiguous and plainly subject to a joint use? If there was substantial evidence tending to show these two tracts were essentially one body used for a single, i. e., a joint purpose, at the time of the condemnation proceedings, then the theory of the court below was right, and the entirety or oneness of the tracts was an issue for the jury. If, on the other hand, there was no substantial evidence that the tracts were one body of land used for a joint purpose at the time of the condemnation proceedings, then the matter became a question of law, and the trial court took the wrong theory of the law.

What is one body of land for the purposes of the assessment of damages under the exercise of the right of eminent domain, in a given case, might be a very simple problem. But



complications arise making it a <sup>369</sup> many-sided problem and very difficult of solution in other cases.

It will be of value in the case at bar to consider some of the elements judicially included, on one side, and judicially excluded, on the other. For instance, it has been held that in the determination of this question mere paper governmental subdivisions into sections, quarter sections, townships, ranges, etc., amount to nothing in determining the oneness or unity of a tract of land: *Chicago etc. R. R. Co. v. Baker*, 102 Mo. 553, 15 S. W. 64; *Wyandotte etc. R. R. Co. v. Waldo*, 70 Mo. 629.

It has been held that a street or road cutting a tract of land in twain is not a controlling factor where the two tracts thus created have been improved together and used for a single purpose: *Hannibal Bridge Co. v. Schaubacher*, 57 Mo. 582; *Kansas City etc. Railroad Co. v. Norcross*, 137 Mo. 415, 38 S. W. 299; *Chicago etc. R. R. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931.

A case, *Coston etc. R. R. v. Turnbull*, 31 Hun, 461, will neatly illustrate the last proposition. In that case Turnbull's farm was divided east and west by the Erie canal. On the north side of the canal was his cultivating land and farm building. On the south side his land was hilly and had no buildings. A railroad company sought to acquire title to a strip of his land next to and on the south side of the canal. On this strip was a never-failing spring, the water of which was conducted by a pipe under the canal to the buildings on the north side where it was used for general farm purposes, there being no other source of supply on that side. There was also a farm bridge spanning the canal, connecting the north parcel of Turnbull's land with the south parcel. It was not shown when this pipe was laid or by what authority, but it was there when Turnbull bought the farm, some thirteen years gone, and had been used constantly since without objection from anyone. It was held that in estimating his damages the commissioners properly treated the farm as a whole, <sup>370</sup> and considered its value as increased by the pipe connection under the canal between the spring on the south side and the buildings on the north.

In considering the problem in hand, another class of cases must be reckoned with, viz., cases laying stress upon the fact

that an intervening strip of land, the fee of which is in another, destroys that contiguity, compactness and unity essential to making two tracts one for the purpose of estimating damages under the exercise of the right of eminent domain: *Leavenworth, N. & S. R. R. Co. v. Wilkins*, 45 Kan. 674, 26 Pac. 16; *Kansas City etc. R. R. v. Littler*, 70 Kan. 556, 79 Pac. 114; *Cameron v. Chicago etc. R. R. Co.*, 42 Minn. 75, 43 N. W. 785; *White v. Metropolitan etc. R. R. Co.*, 154 Ill. 620, 39 N. E. 270.

Then, too, there is a class of cases where two or more tracts of land may be contiguous, or substantially so, but in which each tract is held by a separate holding and has been impressed by a distinct and separate use as substantially independent; for instance, each as a separate farm, or as a distinct home or tenement in a city, etc., in which the bare fact of contiguity has not been allowed controlling force in the assessment of damages for a strip taken from one of said tracts: *Minnesota Val. R. Co. v. Doran*, 15 Minn. 230; *Gibson v. Fifth Ave. etc. Bridge Co.*, 192 Pa. 55, 73 Am. St. Rep. 795, 43 Atl. 339; *Sharp v. United States*, 191 U. S. 341, 24 Sup. Ct. Rep. 114, 48 L. ed. 211.

In the latter case, Justice Peckham spoke for the court, and, in so doing, quoted with approval the following from Judge Gray, who delivered the opinion of the circuit court of appeals, and which is not out of place in the case at bar: "Depreciation in the value of the residue of such a tract may properly be considered as allowable damages in adjusting the compensation to be given to the owner of the land taken. It is often difficult, when part of a tract is taken, to determine what is a distinct and independent tract; but the character of the holding and the distinction between the residue of a tract whose integrity is destroyed by the taking and what are merely other parcels or holdings <sup>371</sup> of the same owner, must be kept in mind in the practical application of the requirement to render just compensation for property taken for public uses. How it is applied must largely depend upon the facts of the particular case and the sound discretion of the court. All the testimony in this case tends to show the separateness of this tract which was the subject of the condemnation proceedings. It had never been farmed or used in connection with either of the other farms owned by the plaintiff in error. It was in no way reasonably or substantially nec-

essary to the enjoyment of the other two tracts. Separated from it by a public road, the 'White' farm, so called, had only been purchased by plaintiff in error ten days before the proceedings for condemnation were begun. The authorities cited by the defendant in error fully support their contention in this respect. In *Currie v. Waverly etc. R. R. Co.*, 53 N. J. L. 381, 19 Am. St. Rep. 452, 20 Atl. 56, cited by counsel for plaintiff in error for the proposition that, where a part of a tract is taken for condemnation, damages to the remaining land shall be given, the court also says: 'It is an established rule in law, in proceedings for condemnation of land, that the just compensation which the land owner is entitled to receive for his lands and damages thereto must be limited to the tract a portion of which is actually taken. The propriety of this rule is quite apparent. It is solely by virtue of his ownership of the tract invaded that the owner is entitled to incidental damages. His ownership of other lands is without legal significance.' It is enough to say that, in our opinion, the two other farms or tracts of land owned by plaintiff in error constituted such separate and independent parcels as regards the land in question that they cannot properly be spoken of as the residue of a tract of land from which the land in question was taken." In the foregoing case stress was laid upon the fact that Sharp had acquired and held the title to these separate and <sup>372</sup> contiguous farms under different holdings, that is, distinct deeds and chains of title.

What are the appreciable elements in a present tangible market value is often a delicate problem and one which to some extent enters into the case. For example, one Patterson owned the whole of one and parts of two other islands in the Mississippi river above the Falls of St. Anthony. His holdings formed substantially a line of shore for nearly a mile parallel with the west bank of the river and distant about one-eighth of a mile and amounted to about thirty-four acres. The location of these islands was such as especially fitted them to form an extensive boom for holding twenty or thirty million feet of logs (the logging business being extensively carried on in that country). This boom had never been built and the islands lay in nature's dress. A boom company was incorporated to build and operate booms and it undertook to condemn Patterson's entire holdings for its corporate purpose. The vital question was whether Patterson

was entitled to pay for his holdings, considered in the light of their especial fitness and value for boom purposes, and the supreme court of the United States held that he was (Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206), Justice Field speaking for the court, as follows:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what it is worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and <sup>373</sup> make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

This court has applied the doctrine of the Patterson case in St. Louis etc. R. R. Co. v. Continental Brick Co., 198 Mo. 698, 96 S. W. 1011, and the same principles have been applied in other cases; e. g., in Mississippi River Bridge Co. v. Ring, 58 Mo. 491; but a distinction has been drawn, and we think well drawn. If the use contended for be merely an intended use resting in the whims or hopes or plans of the owner, and is not a use springing from the special adaptation of the property and recognized as of present marketable value, then the mere fact that the property might be susceptible to such future use is too unsubstantial and problematical to be an element in estimating damages: White v. Metropolitan etc.

R. R., 154 Ill. 620, 39 N. E. 270; Peck v. Railroad, 36 Minn. 343; Gibson v. Bridge Co., 192 Pa. 55, 73 Am. St. Rep. 795, 43 Atl. 339; Goodwine v. Evans, 134 Ind. 262, 33 N. E. 1031; Louisiana Ry. etc. Co. v. Xavier Realty, 115 La. Ann. 328, 39 South. 1.

Now, take the case at bar and apply the foregoing views of the law to the facts, and it would seem, from any point of view, that the case was tried on a wrong theory. Defendant owned the Wallace tract, which he held under a chain of title describing it as "on the Mississippi river." He held the island under a chain of title describing it as "in the Mississippi <sup>374</sup> river." The two tracts were thereby recognized as not contiguous. If we turn to the evidence, we find the fact to be precisely as shadowed forth in defendant's muniments of title, to wit, that a portion of the Mississippi river flows between the two tracts.

It would not be contended that the defendant held title to a part of the channel of the Mississippi river, and his case, therefore, comes somewhat within the purview of those cases holding that an intervening strip of land, the title to which is not in the land owner, destroys the right of such land owner to have damages assessed to both tracts for a strip taken from one.

If the case be viewed from the standpoint of those cases holding that two tracts of land, separated by a street or road or canal, but which are artificially connected with one another and have been improved together and been subjected to a single joint use, may be considered as one body of land for the purpose of assessing damages, yet, it does not fairly fall within that class of cases.

The case at bar seems more nearly belonging to that class of cases where there are two or more independent farms, held by separate chains of title, that have been subjected to an independent and distinctly separate use, and in which it is held that in condemning a strip off of one of these farms, the other farms, though belonging to the same owner, are not to be considered.

There are too many conjectures and problematical elements injected into defendant's feed-lot theory to make it the subject of consideration in estimating damages to any tract but the Wallace tract. Whether the Mississippi river will again assert its full domination over that part of its own channel

between the island and the mainland cannot be known. Whether the stages of the water in the intervening channel will adjust themselves to cropping seasons so that crops from the island may pass over to the feed lot on the shore, <sup>375</sup> with dependable certainty and regularity, can only be guessed at. Defendant may dream it will be so, he may hope it will come to pass, but neither his hopes nor his dreams may be assessed at a pecuniary value by a jury.

On this record we must, therefore, hold that the court erred in permitting the island tract to be considered by the jury, and erred anew in not giving plaintiff its instruction in that behalf.

4. Other questions upon the instructions and upon the admissibility of evidence will naturally adjust themselves at a new trial, and we deem it unnecessary to consider them in this case.

The cause is reversed and remanded, to be retried in accordance with this opinion.

All concur.

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#### **RIGHT OF COURT TO LIMIT NUMBER OF WITNESSES.**

**I. The General Rule, 514.**

**II. Application of the Rule, 516.**

**III. Impeaching Witnesses, 518.**

**IV. Experts, 519.**

##### **I. The General Rule.**

It is undoubtedly well established, as a general rule, that courts have the power and right to limit the number of witnesses to be examined to prove any particular fact, and while this power must be exercised with a reasonable discretion, yet when a fact is sufficiently established, and especially when it is not controverted, the court may properly refuse to suffer its time to be occupied in hearing further testimony on that point: *Gray v. St. John*, 35 Ill. 222. It is within the discretion of the trial court to limit the number of witnesses to be produced and introduced to prove any particular fact: *Burham v. Village of Norwood Park*, 138 Ill. 147, 27 N. E. 1088; *Union Railroad Transfer etc. Co. v. Moore*, 80 Ind. 458; *Kesee v. Chicago etc. R. R. Co.*, 30 Iowa, 78, 6 Am. Rep. 643; *Preston v. City of Cedar Rapids*, 95 Iowa, 71, 63 N. W. 577; *Detroit City Ry. v. Mills*, 85 Mich. 634, 48 N. W. 1007. The court has power to limit the number of witnesses each party may examine as to any particular point, as, for example, a question of opinion: *Carpenter v. Knapp*, 66 Hun, 632, 21 N. Y. Supp. 297. And a reasonable limitation of the number of witnesses upon a single question is within the discretion of the trial

court, even though such limitation is not imposed at the commencement of the trial: *Larsen v. City of Eau Claire*, 92 Wis. 86, 65 N. W. 731. Of course the trial court has a discretion before trial to limit the number of witnesses to be examined to prove any one point in the case, and when the order limiting the number of witnesses is made before any witnesses are introduced, the plaintiff has the right to choose any which he wishes to examine, and cannot be heard to say that he was prejudiced by such order: *Everett v. Union Pac. R. R. Co.*, 59 Iowa, 243, 13 N. W. 109. It is permissible for trial courts, in the exercise of a sound discretion, to limit the number of witnesses that may be called to prove facts collateral to the main issue, and litigants should ordinarily anticipate the exercise of such discretionary power: *Biester v. State*, 65 Neb. 276, 91 N. W. 416. The number of witnesses which a party may be allowed to call to prove a given point is a matter within the discretion of the trial court, and the proceedings of that court, in this respect, is not subject to revision by the supreme court on exceptions: *Cushing v. Billings*, 2 Cush. 158; *Anthony v. Smith*, 4 Bosw. 503. If such discretion is not properly exercised and works prejudicially against a party, his remedy is a motion for a new trial: *Anthony v. Smith*, 4 Bosw. 503. And if the court trying a case without a jury errs in limiting the number of witnesses, this should be urged as one of the grounds for a new trial, as otherwise it will be presumed that the ruling of the court worked no injury: *Burhaus v. Village of Norwood Park*, 138 Ill. 148, 27 N. E. 1088. In such a case the court, in setting aside a default as a matter of favor, may limit the number of witnesses it will hear as to whether a different judgment should be rendered: *Burhaus v. Village of Norwood Park*, 138 Ill. 148, 27 N. E. 1088.

While it is generally within the discretion of the trial court to limit the number of witnesses on different particular subjects involved in the case, such discretion must be reasonably exercised, so as to deprive the parties of no material rights: *Burhaus v. Village of Norwood Park*, 138 Ill. 148, 27 N. E. 1088; *Markham v. Herrick*, 82 Mo. App. 327.

Some of the cases deny the right of the court to limit the number of witnesses to be heard to prove a controlling fact in the case. Thus it has been decided, that when a controlling fact is controverted, each party has the right to have all of his witnesses heard, who have knowledge of facts and circumstances bearing upon the contested point, and that to deny such right is error: *Crane Co. v. Stammers*, 83 Ill. App. 329. The rule thus announced was but an affirmation of the rule laid down in *Village of South Danville v. Jacobs*, 42 Ill. App. 533, that a court may not limit the number of witnesses a party may introduce, unless it be upon some question collateral to the main issue, or if a fact is sufficiently proven and is not controverted, or if it is expressly admitted by the adverse party, a court may, in the exercise of a sound discretion, refuse to allow its time to be wasted

in hearing further evidence, but that when a controlling fact is controverted, each party has the right to have all witnesses heard, who have knowledge of facts and circumstances bearing upon the contested point, and that to deny such right is error. This rule was later approved and reaffirmed in *Cooke Brewing Co. v. Ryan*, 98 Ill. App. 444. In *Williams v. McKee*, 98 Tenn. 139, 38 S. W. 730, the court said that "there is no doubt that the trial judge has the right, within reasonable limits, to restrict the number of witnesses to be examined as to any one point or fact. It is apparent that this right must exist, else by multiplying witnesses a trial might be indefinitely prolonged to the serious detriment of public interests," but it was decided that the trial court should not, before the testimony is introduced, fix a limit on the number of witnesses to be examined on the question of character of the parties, before such character is put in issue: *Williams v. McKee*, 98 Tenn. 139, 38 S. W. 730. And the power of the court to limit the number of witnesses should be exercised at the beginning of the trial, so as to give each party an opportunity of selecting such witnesses as he may deem most important: *Green v. Phoenix Mutual Life Ins. Co.*, 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576; *Markham v. Herrick*, 82 Mo. App. 327. It is a well-settled principle of constitutional law that no person shall be condemned without a hearing, and that everyone who is by process called into court in any matter affecting his interests has an absolute right to be heard, and that any judgment pronounced when such hearing is refused is void. Can there be any difference in principle between refusing a hearing and according a partial hearing only? It would seem that the power to limit the number of witnesses which will be heard on a contested issue can be upheld only when it is apparent that a party is trifling with the court and seeking in bad faith to waste its time and obstruct the administration of justice, and that a verdict or finding against him on such issue must be set aside when he was denied the right to offer and have received all the evidence and witnesses produced by him, for under no circumstances can it be judicially known that such additional evidence or witnesses, if received, would not have overcome those of his adversary. To restrict the parties, as courts sometimes do, to an equal number of witnesses on each side of the question, must, under ordinary circumstances, result in a verdict against the person on whom the burden of proof rests, for he cannot be held to have sustained such burden where the testimony offered by him only equals that offered by his adversary.

## II. Application of the Rule.

In applying the rule that a reasonable limitation of the number of witnesses upon a single question is within the discretion of the trial court, it has been decided that if witnesses are giving their opinion as to what the brand on an animal is, the court may fix the



number of witnesses that the parties may call on the subject: *Huett v. Clark*, 4 Colo. App. 231, 35 Pac. 671. And the court has power to limit the number of witnesses each party may examine as to any question of opinion: *Carpenter v. Knapp*, 66 Hun, 632, 21 N. Y. Supp. 297. Or, on the trial of an action for seduction, if the defendant offered evidence of good moral character, and the plaintiff declared that he did not intend to offer any evidence to impeach the defendant's character, it was not error in the court to refuse to allow more than three witnesses to testify on that subject for the defendant: *Cox v. Pruitt*, 25 Ind. 90. And if the court notifies the parties, before any evidence is offered, that no more than eleven witnesses will be permitted on each side to testify as to the value of the property in dispute, and enforces such order, such limitation is within the discretion of the court, unless a clear abuse of such discretion is shown: *Union Railroad etc. Co. v. Moore*, 80 Ind. 458.

The court, in its discretion, in an action for damages for a change of grade, can limit the number of witnesses touching the value of the property to seven on each side, and where such order has been made limiting the number of witnesses on such issue and a witness offered by one of the parties proves incompetent, such party is not entitled to offer another witness in his stead: *Preston v. City of Cedar Rapids*, 95 Iowa, 71, 63 N. W. 577.

The trial court may make a rule or order limiting to six the number of witnesses to testify to any particular point upon each side: *Love v. Barnesville Mfg. Co.*, 3 Penne. 152, 50 Atl. 536; *Giordano v. Brandywine Granite Co.*, 3 Penne. 423, 52 Atl. 332. But such rule or order cannot be enforced and does not apply when the matter inquired about is the insanity or mental condition of a testator or grantor: *Pritchard v. Henderson*, 3 Penne. 128, 50 Atl. 217. In *Green v. Phoenix Mutual Life Ins. Co.*, 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576, it appeared that after the examination of eight witnesses by the plaintiff on the question of the insanity of a grantor, the court limited the parties each to nine witnesses, including those already examined on the question of such insanity, and found the issue for the defendants, and it was held on appeal that the court erred in limiting the number of witnesses, especially so after the plaintiff had examined the greater part of his nine witnesses before the rule was announced. Such a rule must be announced at the beginning of the trial, so as to give each party an opportunity to select such witnesses as he may deem most important: *Green v. Phoenix etc. Ins. Co.*, 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576.

The number of witnesses to be allowed to testify on the question of damages to land by hauling logs over it may properly be limited to six or seven on each side: *Burt-Brabb Lumber Co. v. Crawford*, 27 Ky. Law Rep. 798, 86 S. W. 702. Or, in an action on notes given for a patent right, and the utility of the patent is one of the issues, there is no abuse of discretion in limiting the parties to fifteen witnesses

each upon such issue: *Clark Co. v. Rice*, 127 Wis. 451, 106 N. W. 231. And, after an examination of a great number of witnesses as to certain facts which are conceded by the opposite party, there is no error in refusing to hear other witnesses to prove the same facts: *Mueller v. Rebhan*, 94 Ill. 142.

It seems that the trial court may, in its sound discretion, set aside its own order limiting the number of witnesses. Thus, in the absence of a showing of an abuse of discretion, it is not error for the court, after making a rule limiting the number of witnesses on a certain question to three on each side, to permit the defendant to examine more than that number: *Brady v. Shirley*, 18 S. Dak. 608, 101 N. W. 886.

It is not, however, within the power of the trial court to arbitrarily and unreasonably limit the number of witnesses to a given point in issue, and its discretion in the matter must be exercised with caution. lest abuse and injury to litigants ensue. Hence it has been decided that a party cannot lawfully be limited by the court to one witness upon a vital point in issue: *Hubble v. Osborn*, 31 Ind. 249; and that in an action for breach of promise the limiting of the defendant to three witnesses on the general reputation, without announcing such ruling before the question is gone into, is not a sound exercise of the discretion of the trial court: *Markham v. Herrick*, 82 Mo. App. 327.

The proper application of a rule limiting the number of witnesses on a given point must necessarily depend upon the peculiar circumstances of each case, and the nature of the issue to which the evidence is adduced: *Nelson v. Wallace*, 57 Mo. App. 397. And the appellate court may properly set aside a verdict for error in limiting the plaintiff to three witnesses when such limitation appears to have been arbitrary and an abuse of discretion: *City of Covington v. Taffee*, 24 Ky. Law Rep. 373, 68 S. W. 629. In another case the plaintiff sued for slander in charging him with dishonesty, and the defendant, to mitigate damages, offered evidence of plaintiff's bad reputation in that respect, and it was determined to be error for the trial court to limit him to ten witnesses on that issue: *Ward v. Dick*, 45 Conn. 235, 29 Am. Rep. 677. And in *Barhyte v. Summers*, 68 Mich. 341, 36 N. W. 93, it was decided generally that it is error for the trial court to limit the number of witnesses to be sworn by either party upon a material and one of the main issues of the suit. The court said that "the defendant was entitled to offer and produce all the proof he had upon this matter, and it is impossible to say that the denial of such right did not prejudice his case": *Barhyte v. Summers*, 68 Mich. 341, 36 N. W. 93.

### III. Impeaching Witnesses.

The trial court may properly, in the exercise of a sound discretion, limit the number of impeaching witnesses which will be allowed to

be called on the trial of the case: *Bunnell v. Butler*, 23 Conn. 64. The number of witnesses that may be called for impeachment purposes to testify as to reputation for truth and veracity is discretionary with the trial court: *Bays v. Herring*, 51 Iowa, 286, 1 N. W. 558; *Bays v. Hunt*, 60 Iowa, 251, 14 N. W. 785. In an action for slander the trial court may, in its discretion and with proper notice to the parties, limit the number of witnesses to be introduced on each side to prove the general reputation of the plaintiff for honesty and integrity, but to arbitrarily limit the number to three is error: *Hoag v. Cooley*, 33 Kan. 387, 6 Pac. 585. After an equal number of witnesses have testified on each side in the impeaching or supporting of the character of a party or witness, it is in the discretion of the trial court whether a further or greater number of witnesses shall be examined by either side: *Bissell v. Cornell*, 24 Wend. 354. And witnesses to character testifying in rebuttal of impeachment may properly be limited to the number of impeaching witnesses: *Hollywood v. Reed*, 57 Mich. 234, 23 N. W. 972.

The action of a trial court in attempting to limit the number of impeaching witnesses by saying to the attorney for the party calling them that if he called any more, it would be at his expense, is not erroneous, as an intimation by the court that the character of the person attacked had been sustained: *Overstreet v. Dunlap*, 56 Ill. App. 486.

#### IV. Experts.

It is well settled that the trial court may limit the number of experts to be called as witnesses in a given case: *Hilliard v. Beattie*, 59 N. H. 462. It is always within the discretion of the trial court to limit the number of expert witnesses, and unless it clearly appears that there has been an abuse of this discretion, its exercise is not reviewable on appeal: *Sixth Avenue R. R. Co. v. Metropolitan etc. Ry. Co.*, 138 N. Y. 548, 34 N. E. 400. Expert evidence should be confined within reasonable bounds, and where five experts have been examined by each side on a particular issue, it is proper for the court to decline to allow others to be heard: *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882. It is no abuse of discretion to limit each party to five expert witnesses on a particular point in issue: *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559.

In an action for injuries to real property by a change of street grade, the refusal by the trial court to permit the respective parties to examine more than three real estate expert witnesses each is not an abuse of discretion: *Swope v. City of Seattle*, 36 Wash. 113, 73 Pac. 607.

After the presiding judge has limited each party to seven expert witnesses, it is proper for the court, after the petitioner has examined his seven witnesses, to prevent him from extracting an expert opinion on the cross-examination of a witness called by the respondent not as an expert: *White v. City of Boston*, 186 Mass. 65,

71 N. E. 75. In the case of expert witnesses called upon a matter collateral to the main issue, the trial court has the right to limit the number to be produced, but such right must be exercised within the bounds of a reasonable discretion, and in determining whether such right was properly exercised, a court of appeal will inquire whether the evidence already presented by the party was sufficient to establish his side of the issue, as it is not proper to reject further evidence, even of experts, when the judicial mind remains unconvinced by that already produced: *Traders' Ins. Co. v. Catlin*, 71 Ill. App. 569.

**CASES**  
**IN THE**  
**COURT OF APPEALS**  
**OF**  
**NEW YORK.**

**PEOPLE v. DOLAN.**

[186 N. Y. 4, 78 N. E. 569.]

**EVIDENCE of Other Crimes.**—On a prosecution for falsely uttering a forged instrument with intent to defraud, knowing it to be forged, evidence is properly received against the accused of his indorsing and uttering other forged notes at or about the same time, all payable to him, and that he was then in financial difficulties seeking to raise funds to meet his obligations, and the whole evidence tending to show a general scheme. (pp. 523, 525.)

**EVIDENCE, SECONDARY, of Other Forged Writings.**—On a prosecution for uttering forged writings, secondary evidence of other and similar writings, all purporting to be payable to the defendant, is admissible, where notice to produce them has been served on him and they are not produced at the trial, and some, though slight, evidence is first offered tending to prove that such writings are in his possession or under his control. (pp. 525, 526.)

**EVIDENCE, SECONDARY, of Forged Writings, Question of Fact, When Properly Determined by the Trial Judge.**—Where secondary evidence of other forged writings is sought to be introduced on the ground that notice to produce the originals has been served on the accused, who has failed to produce them, and that they are in his possession or under his control, and the evidence tends to show a course of business from which it may be presumed that such writings were returned to the accused, a question of fact is presented to the trial judge as to whether such writings are in the possession or under the control of the defendant, the decision of which is not reviewable on appeal. (p. 527.)

**EVIDENCE, Self-serving Declarations.**—On a prosecution for uttering forged promissory notes, the accused is not entitled, for the purpose of showing that he did not know the indorsement was forged, to testify to self-serving declarations and hearsay statements made by him to his clerk to the effect that the latter had admitted that she made the note herself, especially where she, being then present in court, could have been called as a witness. (p. 529.)

**JURY TRIAL, Taking Exhibits to the Jury-room Without the Consent of the Defendant.**—The fact that the jurors, without the consent of the defendant, took to the jury-room certain exhibits which had been received in evidence and examined by them during the trial, does not entitle the defendant to a new trial, where it does not appear what use was made of the exhibits while in such room. (p. 529.)

Prosecution for forgery resulting in a verdict against the defendant. On appeal, the conviction was reversed by the appellate division of the supreme court of the first judicial department.

William Travers Jerome, district attorney, and Robert C. Taylor, for the appellant.

Alfred R. Page, for the respondent.

7 WERNER, J. The defendant was indicted by the grand jury of New York county for the crime of forgery in the second degree. The indictment contained two counts. The first count charged him with forging a note dated October 13, 1897, for \$2,000, payable to the order of himself at the West Side Bank, and purporting to be signed by the firm of Thos. Cockerill & Son. The second count charged him with feloniously uttering the same forged instrument with intent to defraud, knowing it to be forged. The first count was abandoned at the trial and the defendant was tried and convicted on May 19, 1904, upon the second count.

There was ample evidence to warrant the jury in finding the defendant guilty of uttering the forged instrument as charged in the second count, but the judgment of conviction was set aside at the appellate division by a divided court, for errors said to have been committed by the trial court in its rulings upon the admission and exclusion of evidence.

That the note was a forgery was conceded; and it was established beyond a doubt that Cockerill & Son, whose name had been signed to it, had never authorized such signing. It was brought to the Twelfth Ward Bank of New York city on October 13, 1897, the day of its date, by a Miss Fitzpatrick, who was the bookkeeper of the defendant. The evidence was sufficient to justify the jury in finding that the defendant called at the bank later in the same day and indorsed it. The amount of the note was then placed to his credit. The defendant, testifying in his own behalf, stated that he was not in New York city on that date; that he did not indorse the note until some days later, and that he did not then know it was a forgery, as he had many transactions of a somewhat similar character with the bank. The defendant was a stone contractor, and the evidence

tended to show a course of business dealings between him and Cockerill & Son, who were building contractors.

<sup>s</sup> For the purpose of showing guilty knowledge on the part of the defendant the prosecution proved the uttering by him of several other forged notes. The defendant's counsel objected to the evidence relating to these other notes, and the exceptions based upon that objection raise the important question in this case. Two of the other forged notes were signed with the name of Cockerill & Son and made payable to the defendant. They were indorsed by him and discounted at the Twelfth Ward Bank. The first one was a three months' note dated May 13, 1897, and was for \$2,500. The second was a two months' note dated August 13, 1897, and was for \$2,000. It was given to pay off the first note, and at the same time the defendant paid the bank \$500 and the amount of the discount. The note set up in the indictment was given to pay off this second note. There were two other forged notes signed with the name of James Stewart & Co., who were also building contractors, between whom and the defendant had been business dealings. Each one of these notes was for \$3,200, made payable to the defendant and indorsed by him. The first one was given to Isaac A. Hopper, who procured it to be discounted for the defendant at the Twenty-third Ward Bank and turned over the proceeds to the defendant. The second the defendant gave to John J. Hopper, a brother of Isaac, who loaned him money on it. Still another one of the forged notes was signed with the name of Patrick Gallagher, who was also a builder with whom the defendant had business dealings. This note was for \$1,697, and was discounted by the defendant at the Nineteenth Ward Bank. All these transactions took place in 1897, and the evidence shows that at that time the defendant was in financial difficulties.

We think that all this evidence was clearly competent and that the learned appellate division erred in holding otherwise. The rules governing the introduction of proof of other crimes than that charged in the indictment have been so fully discussed in recent cases in this court that no extended examination of the authorities need here be made: *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 63 L. R. A. 193;

People v. Weaver, 177 N. Y. \* 434, 69 N. E. 1094. The case at bar is controlled by the decision in People v. Everhardt, 104 N. Y. 591, 11 N. E. 62. In that case the late Judge Earl stated the rule as follows: "Upon the trial the people were allowed to prove, against the objection of the defendant, the uttering of other forged checks by him upon other occasions. In this there was no error. The defendant by his plea of not guilty had put in issue everything which it was incumbent upon the people to prove. They had no direct or positive evidence that he personally forged the check which he uttered, and it was open for him to show that at the time he uttered it he had no knowledge that it was forged, and was therefore innocent of crime; and for the purposes of showing the prisoner's guilty knowledge in such cases, it has always been held competent to prove other forgeries. Such proof is not received for the purpose of showing other crimes than that charged in the indictment, but for the purpose of showing the guilty knowledge and intent which are elements of the crime charged, and it can be considered by the jury only for that purpose." "A man might think," said Judge Peckham in People v. Sharp, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319, "the money he passed was good, and he might be mistaken once or even twice; but the presumption of mistake lessens with every repetition of the act of passing money really counterfeit." The latter observation very tersely states a rule that is as applicable to prosecutions for forgery as to cases of passing counterfeit money.

It is contended, however, that the rule has been changed by our decision in the recent case of People v. Weaver, 177 N. Y. 434, 69 N. E. 1094. We think there is no similarity between the two cases. In the Weaver case (177 N. Y. 434, 69 N. E. 1094) it was claimed by the defendant that she believed in good faith to have been authorized by one Davis to indorse the note there charged as a forgery. Evidence of other forged notes not bearing the name of Davis was admitted. This was held to be error. In the case at bar the defendant does not claim to have believed that he had authority to sign the name of Cockerill & Son to the forged note he is charged with uttering. His contention is that he <sup>10</sup> did not know it was a forgery. The difference between the two cases is obvious. Upon the record now before us



the issue of guilty knowledge was squarely up, and, as bearing upon it, evidence of the uttering of other forged instruments by the defendant was clearly competent.

There is also another ground upon which this evidence was competent. All the notes referred to in the evidence were made at about the same time. In each case they were made payable to the defendant and indorsed by him. During the period covered by all the notes the defendant was endeavoring to raise sufficient funds to meet his obligations, and in each case he used the name of some builder with whom he had done business and with whose affairs he was familiar. This combination of circumstances was sufficient to establish a common plan and identity of method so connected as to have a strong tendency to overcome any claim of innocent intent in the uttering of the note charged in the indictment. The evidence bearing on these other notes served to show that the defendant was endeavoring to meet his obligations as they became due, by making a fraudulent and intentional use of the names of contractors with whom he had business relations. The same general features were present in all of the transactions which seem to have been the product of one general scheme. These facts and circumstances were sufficient, we think, to bring the case within the exceptions to the general rule that excludes proof of extraneous crimes. As was said in the *Molineux* case (168 N. Y. 264, 61 N. E. 286, 63 L. R. A. 193): "They must be so connected as parts of a general scheme, or they must be so related to each other as to show a common motive or intent running through them." It is true that the evidence of this general plan or scheme also tended to show the defendant guilty of other crimes, but that, as was very aptly stated by Judge Cooley in a Michigan case, is one of the misfortunes of such a defendant's position: *Carver v. People*, 39 Mich. 786.

It is further contended by the learned counsel for the defendant that even if the evidence relating to the other <sup>11</sup> forged notes was admissible, yet no proper foundation was laid for its introduction. Notices to produce these other notes had been served by the prosecution upon the defendant, but they were not produced at the trial. The prosecution was thus driven to give secondary evidence of their contents. When that was attempted the objection was promptly raised that such evidence could only be received

after proof of loss or destruction of the notes, or of their delivery to the defendant. It is an eminently safe rule that where it is sought to give evidence of other forgeries, the forged documents upon which it is predicated must be produced, and so it has been held in other jurisdictions: *State v. Breckenridge*, 67 Iowa, 204, 25 N. W. 130; *State v. Saunders*, 68 Iowa, 370, 27 N. W. 455; *People v. Lagrille*, 1 Wheel. Cr. Rep. 412; *Anson v. People*, 148 Ill. 494, 35 N. E. 145. But in none of the cases cited was there any notice to produce; neither were the instruments in question sought to be accounted for. The rule is subject to the same qualification in criminal as in civil cases. The instrument must be produced or its absence satisfactorily accounted for: *State v. Cole*, 19 Wis. 129, 88 Am. Dec. 678. Of course the mere notice to produce does not take the place of evidence, and it must be shown that the instrument is in the possession or under the control of the party required to produce it: *Smith v. Sleaf*, 1 Car. & K. 48. "But of this fact very slight evidence will raise a sufficient presumption where the instrument exclusively belongs to him, and has recently been or regularly ought to be in his possession, according to the course of business": 1 Greenleaf on Evidence, sec. 560. In *Robb v. Starkey*, 2 Car. & K. 143, 61 Eng. Com. L. 143, a notice to produce a contract was served upon defendant. Plaintiff's clerk testified that he could not say positively whether he had sent that particular contract to Bourne, defendant's broker; but he also stated that if it came into his hands to be delivered to Bourne in the ordinary course of business, he had no doubt that it had been delivered. This was held sufficient to permit secondary evidence of the contract. To the same effect is *Henry v. Leigh*, 3 Camp. 499, decided by Lord Ellenborough.

<sup>12</sup> In the light of these suggestions let us now examine the evidence in the case at bar as to the other forgeries. There were five of them; two Cockerill notes, two Stewart & Co. notes, and one Gallagher note for \$1,697. There was fragmentary and incomplete evidence as to other Gallagher notes, but the evidence as to all Gallagher notes, except the one for \$1,697, was stricken out and need not be considered. In each case where the note then considered was not directly traced into the defendant's hands, an officer of a bank testified that it had been returned to the defendant, but this

was stated not so much from personal recollection as from the regular course of business which had been followed. The first Cockerill note was for \$2,500, and was discounted at the Twelfth Ward Bank. It came due August 13, 1897, and on that day was seen in the possession of the note teller. Later in the day the defendant came to the bank, paid \$500, and gave a new note for \$2,000, and also paid the amount of the discount, thus paying off the first note. The president of the bank who had conducted this transaction was dead, and there was nobody to swear that the note was actually delivered to the defendant. The second Cockerill note came due on October 13th, the date of the note set up in the indictment, and was paid off by the giving of the latter note. Defendant came to the bank on that day to indorse the latter note. Isaac A. Hopper, who was vice-president of the bank, testified that he returned one of these notes to the defendant, but he did not know which one, and the cashier testified to the custom that when a new note was given the old one was returned.

The first Stewart note was for \$3,200, dated July 29 or 30, 1897, and payable at the Marine Bank of Buffalo. It was discounted at the Twenty-third Ward Bank of New York city at the request of Isaac A. Hopper, and fell due about October 25, 1897. On October 19th John J. Hopper, a brother of Isaac, loaned defendant \$3,200 to pay off this note, and defendant promised to bring the note to him when paid, but failed to do so. It was paid by defendant at the bank on October 29th, and ordered returned from Buffalo, to <sup>13</sup> which place it had been mailed. It was received at the bank on October 26th. The second Stewart note was returned to defendant by John J. Hopper. The Gallagher note was discounted at the Nineteenth Ward Bank and came due about August 25, 1897. Defendant paid the note at the bank on August 27th. He had received a \$1,500 check from John J. Hopper and this check was received at the bank when the note was paid.

From this résumé of the evidence bearing upon the ultimate disposition of the several notes referred to, we think it is quite permissible to draw the conclusion that they were all returned to the possession of the defendant. That was the ordinary course of business, as testified to by one of the witnesses, and that is the familiar experience of all who

have occasion to pay notes at banks. There was evidence in this behalf which, to say the least, presented a question of fact for the determination of the trial judge, and his decision thereon is not reviewable in this court: *Dix v. Atkins*, 128 Mass. 43; *Kearney v. Mayor etc.*, 92 N. Y. 617, 621; *Mason v. Libbey*, 90 N. Y. 683; *McCulloch v. Hoffman*, 73 N. Y. 615; *Thompson on Trials*, sec. 806. It may be added that where the instruments sought to be produced are of little or no value, as in this case, the proof required to establish loss or possession is proportioned to their character and value: *Jackson v. Root*, 18 Johns. 60, 73; *Thompson on Trials*, sec. 809; 1 *Greenleaf on Evidence*, sec. 558.

The next question for consideration arises upon the exclusion of certain questions put to the defendant by his counsel when he was testifying in his own behalf. The defendant had testified that he did not know that the note set up in the indictment was a forgery until it became due on November 13, 1897, when he was informed by Mr. Steers, the president of the bank, that there was an informality about it, and that he, the defendant, returned to his office and had a conversation with Miss Fitzpatrick. The following questions were then asked him and excluded under exception: "Q. As a result of that conversation did you direct her to go to anyone <sup>14</sup> and tell her what to tell them? Q. Who did you tell her to go to see? Q. Did you afterward, after that time, see Mr. Steers, the president of the bank, and did he tell you that Miss Fitzpatrick had been to see him? Q. Did you after that time see Mr. John F. Cockerill, and did he tell you that Miss Fitzpatrick had been to see him? A. Yes, sir; he did. Q. Now, when you saw Miss Fitzpatrick at your office did she tell you that she had made that note? Q. Did Mr. Steers, the president of the bank, after the thirteenth day of November, 1897, tell you that she had been to see him and told him that she had made that note? Q. Did Kate Fitzpatrick, when you saw her in the office, tell you that she had made that note?" It is contended by the learned counsel for the defendant, and the appellate division has held, that the facts called for by these questions were admissible as tending to show that the defendant did not know the note set forth in the indictment was a forgery, and as bearing upon the question of his intent in uttering it. It may be conceded that he had the

right to introduce all proper evidence tending to establish these facts, but we do not think the evidence called for by the quoted questions is of that character. It is obvious that these interrogatories were designed to elicit self-serving declarations and hearsay statements of the bank president and Miss Fitzpatrick, the latter of whom was in the court-room and might have been called had the defendant desired her evidence. It appears that the bank president had died prior to the trial, but that did not make the evidence admissible: *Gray v. Goodrich*, 7 Johns. 95. Had the declarations called for been admitted they would have been hearsay, which were not within any of the exceptions to the rule excluding such evidence. We think the rulings of the trial court in this regard were correct, since the defendant was permitted to testify to the one competent fact, that the first knowledge he had that the note was a forgery was when he talked with Miss Fitzpatrick.

After the jury had brought in their verdict the counsel for the defendant called attention to the fact that the jury had <sup>15</sup> taken to the jury-room certain exhibits introduced in evidence by the prosecution. This was subsequently urged as ground for setting the verdict aside. It does not clearly appear just how the jury obtained possession of the exhibits. Under section 425 of the Code of Criminal Procedure, exhibits can be taken into the jury-room "only upon the consent of the defendant and the counsel for the people." The defendant did not consent to the taking of these exhibits, but no objection was made to the jury having them until after the verdict against the prisoner had been rendered, which was more than an hour after the jury had retired for deliberation. The exhibits thus taken were two notes made by the defendant on the same date as the note charged in the indictment, introduced to show that the defendant was in New York city on that date, and a specimen note written by the defendant at the trial at the request of the district attorney. These papers had been examined by the jury during the trial. It does not appear what use the jury made of them while in the jury-room, and we do not think their further examination of them, if any, was such a substantial error as to warrant this court in awarding a new trial. It is our duty to render judgment without regard to technical errors, defects or exceptions which do not affect the sub-

stantial rights of the parties: Code Crim. Proc., sec. 542; *People v. Gallagher*, 75 App. Div. 39, 78 N. Y. Supp. 5; affirmed, 174 N. Y. 505, 66 N. E. 1113.

The record contains other exceptions to rulings and to refusals by the trial court to charge as requested by defendant's counsel, but these present no question of sufficient importance to justify further discussion.

The order of the appellate division should be reversed, and the judgment of conviction of the trial court affirmed.

Cullen, C. J., Gray, Edward T. Bartlett, Vann, Willard Bartlett and Chase, JJ., concur.

Order reversed, etc.

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*In Prosecutions for Forgery* evidence of other forgeries than the one charged may be admissible: See the note to *Sykes v. State*, 105 Am. St. Rep. 1003, on evidence of other crimes. As to what constitutes forgery, see the note to *Arnold v. Cost*, 22 Am. Dec. 306; and as to what instruments may be the subject of forgery, see the note to *Hendricks v. State*, 8 Am. St. Rep. 466.

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## RAND v. IOWA CENTRAL RAILWAY COMPANY.

[186 N. Y. 58, 78 N. E. 574.]

**BANKRUPTCY**—Title not Devested Unless There is an Appointment of a Trustee.—If a bankrupt owns a chose in action, such as a claim for services performed by him, the existence of which chose is not disclosed by him in the bankruptcy proceedings, and they are therefore terminated without the appointment of any trustee, the bankrupt's title to such chose does not pass out of him, and he may subsequently maintain an action thereon. (p. 532.)

Action to recover a claim for services rendered. Judgment was pronounced in favor of the defendant by the trial court and affirmed on appeal by the appellate division of the supreme court of the first judicial department.

F. K. Pendleton, Aaron P. Jetmore and Ellery O. Anderson, for the appellant.

Arthur H. Van Brunt, for the respondent.

<sup>59</sup> BARTLETT, J. The plaintiff in this action recovered a verdict of two thousand eight hundred and forty dollars for services alleged to have been rendered to the defendant

corporation. Notwithstanding the verdict the court at trial term, by consent of counsel, entertained and finally granted a motion to dismiss the complaint. The judgment thereupon rendered has been affirmed by the appellate division upon the ground that the plaintiff had been divested of all title to the claim in suit by reason of the fact that he was adjudicated a bankrupt after the cause of action had accrued in his favor and before the beginning of <sup>60</sup> this suit. The adjudication in bankruptcy was deemed to have this effect, although no trustee in bankruptcy was ever appointed.

It is apparent from the record that the omission to appoint a trustee must have been due to the failure of the plaintiff to disclose the existence either of this claim or any other property in the bankruptcy proceedings. While the concealment of any property on the part of a bankrupt must be deemed a reprehensible act as toward his creditors, it by no means follows that such concealment has any bearing upon the question as to whether the bankruptcy proceedings have gone far enough to divest the bankrupt of title. In our judgment the proceedings in the case of the plaintiff had not progressed sufficiently to deprive him of the right to maintain an action in his own name in the state court upon the claim in suit. The bankruptcy act of 1898 (section 70) provides that the trustee of the estate of a bankrupt upon his appointment and qualification shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged bankrupt. It is plain that this provision can never become effective until a trustee in bankruptcy shall have been appointed. Here none was appointed; hence the conditions did not exist which were requisite to render this provision of section 70 operative.

Such was the view necessarily adopted by this court in affirming the judgment in the case of *Fuller v. Jameson*, 184 N. Y. 605, 77 N. E. 1187, where the case turned upon the question whether the title to insured property had been changed by reason of an adjudication in bankruptcy against the owner, the insured property having been burned after the referee in bankruptcy had announced the appointment of a receiver but before the order of appointment was actually signed. We agreed with the courts below that the bankruptcy proceedings had not gone far enough at the time of the fire to divest the insured of his title.

If that conclusion was correct, it follows that the present judgment cannot be sustained. The proposition of law involved in that decision was that under section 70 of the <sup>61</sup> bankruptcy act of 1898 the appointment of a trustee is essential to divest the bankrupt of a title to his property. As was said by the supreme judicial court of Massachusetts in another litigation growing out of the same fire: "No change of title was effected until the appointment and qualification of the trustee": *Fuller v. New York Fire Ins. Co.*, 184 Mass. 12, 67 N. E. 879. So here the plaintiff's title to the chose in action, which is the basis of the present suit, did not pass out of him in the bankruptcy proceedings, since no trustee was appointed to whom it could pass.

But it is urged that the defendant by payment of a judgment herein to the plaintiff would not be protected if it should thereafter be sued upon the same cause of action by any trustee of the bankrupt estate who might hereafter be appointed. It seems to us that the defendant is not exposed to any serious danger in this respect. "If in such cases there is a recovery, and any question arises as to the right of the trustee or creditors to the money, or as to the defendant's being protected in paying it to the proper party, this may be secured by subsequent steps being then taken for that purpose": *Griffin v. Mutual Life Ins. Co.*, 11 Am. Bank. Rep. 622. We see no reason why such steps should not be taken if necessary by means of an application to the bankruptcy court. It may very well be that any sum recovered by the plaintiff in the present action will be held by him as trustee for his creditors; but this is a matter which does not concern the defendant so long as the plaintiff holds the legal title to the claim and the defendant is secured against any possibility of being compelled to pay it twice.

We do not overlook the fact that the conclusion which we have reached upon the principal question presented by this appeal is in conflict with the view expressed by the supreme court of Minnesota in *Rand v. Sage*, 94 Minn. 344, 102 N. W. 864; but while entertaining the highest respect for that learned tribunal, we remain satisfied with the correctness of our own decision in *Fuller v. Jameson*, 184 N. Y. 605, 77 N. E. 1187, which, as has already been pointed out, is in harmony with the construction put upon <sup>62</sup> section 70 of



the bankruptcy act by the supreme judicial court of Massachusetts.

It follows that the judgment of the appellate division and the judgment entered upon the dismissal of the complaint must be reversed and a new trial granted, costs to abide the event.

We are asked by counsel for the appellant to direct judgment in favor of the plaintiff upon the verdict, but so far as the action of the trial court and appellate division set aside that verdict, it involved a question of fact, and is, therefore, not subject to review by this court, especially as the appellate division expressed the opinion that the verdict was against the evidence.

Cullen, C. J., Vann, Werner, Hiscock and Chase, JJ., concur.

O'Brien, J., absent.

Judgment reversed, etc.

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*The Principal Case* reverses the judgment of the appellate division reported in *Rand v. Iowa Cent. R. R. Co.*, 96 App. Div. 413, 89 N. Y. Supp. 212. The decision of the appellate division, however, has been approved by the supreme court of Minnesota in *Rand v. Sage*, 94 Minn. 344, 102 N. W. 864.

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## BRACHER v. EQUITABLE LIFE ASSURANCE SOCIETY.

[186 N. Y. 62, 78 N. E. 714.]

**INSURANCE, LIFE** Right to Deduct Semi-annual Premiums from the Amount Due.—If a life insurance policy provides for the payment of premiums semi-annually, but contains a condition that in case of the receipt of a quarterly or semi-annual premium, any future payments which at maturity of the contract are necessary to complete the full year's premiums shall be deducted from the amount of the claim, if the insured dies during the first half of the policy year, semi-annual premium for which has not been paid, the insurer is entitled to deduct from the policy the semi-annual premium for the second half of the insurance year. (p. 534.)

Charles W. Pierson and William C. Diamond, for the appellant.

Raphael J. Moses and James A. Hudson, for the respondent.

<sup>64</sup> CULLEN, C. J. This appeal presents the single question of the construction of the condition of an insurance policy by which the defendant, in consideration of a payment in advance of three hundred and eighty-three dollars and ninety cents, and of a payment of the same sum on or before the ninth day of February and August in every year thereafter during the life of the insured, agreed to pay upon the death of the insured to the plaintiff the sum of ten thousand dollars. The third condition of the policy, which in terms was made part of the contract of insurance, provides: "Although the contract is based on the receipt of premiums annually in advance, the premium may be made payable in semi-annual or quarterly installments in advance, but in such case any future installments which at the maturity of the contract are necessary to complete the full year's premium shall be deducted from the amount of the claim." The insured died on November 16, 1902, and the controversy is over the premium which, had the insured lived, would have become payable on February 9, 1903. The defendant claimed the right, under the condition above quoted, to deduct this from the policy, the deceased having died in the first half of the policy year. The trial judge decided the controversy in favor of the defendant, and the judgment entered on his decision has been reversed by the appellate division by a divided court.

We are of opinion that the view taken by the trial judge was correct. The decision of the appellate division gives no effect to the condition of the policy above recited. This is conceded by the learned judge who wrote for the majority of the court, who held that the condition had no application to this policy, which instead of providing for an annual premium provided for semi-annual premiums. He further thought that the condition was inconsistent with the absolute obligation on the face of the policy to pay the sum of ten thousand dollars. We entertain a different view, and think that the condition is <sup>65</sup> particularly applicable to policies of the character of the one before us. There is the express declaration that the contract is based on the receipt of the premiums annually in advance, and this is followed by the statement, not that annual premiums are payable in semi-annual or quarterly installments in advance, but that the premium "may be made payable" in such manner. In

this policy the premium has been made payable semi-annually, and this fact brings it exactly within the conditions. If, in truth, the policy was issued on the basis of an annual premium, as is declared, then the propriety of the deduction of subsequently accruing installments during the policy year is apparent. Had the premiums been made payable annually the defendant would have received in advance the same sum it now seeks to deduct. If, for the convenience of the policyholder or to suit his means, he is allowed to make the payments semi-annually or quarterly, there is no reason why the defendant should be at a greater pecuniary loss than if the payment had been made annually. It is not at all a question of interest on the deferred payments, which would be trifling, but of the right of the defendant to receive the principal of those payments. Nor is there any necessary inconsistency between the promise to pay the ten thousand dollars and the right to deduct the unpaid premium of the policy year. Had the deceased died in the second half of the policy year no deduction would be made, for then the whole annual premium would have been paid. We think no other conclusion can be reached unless we discard the express statement that the policy is based on an annual premium, a statement supported by other provisions in the policy which give the exact value of the policy for cash, for loans and for paid-up life policies at the end of each year.

The order of the appellate division should be reversed and the judgment of the trial term affirmed, with costs in both courts.

Gray, Edward T. Bartlett, Vann and Hiscock, JJ., concur.

Haight and Werner, JJ., dissent.

Order reversed, etc.

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*Under a Life Insurance Policy* the premium on which is payable annually in advance, of which only one quarterly installment has been paid at the time of the death of the insured, the insurer is entitled to have the amount of premium remaining due for the current year deducted from the amount of the policy, before paying it: *Albert v. Mutual Life Ins. Co.*, 122 N. C. 92, 65 Am. St. Rep. 693.

**GILLIAM v. GUARANTY TRUST COMPANY.**

[186 N. Y. 127, 78 N. E. 697.]

**PERSONS Who Will Take Under a Gift or Trust.**—When property is, at a future date, to pass to a certain class of persons, it will be distributed amongst those who at that date compose such class. (p. 538.)

**CONSTITUTIONAL LAW—Heirs at Law, Power of the Legislature to Change the Rule Designating.**—Heirs at law do not, prior to the death of the ancestor or other person under whom they claim, have any vested right to the continuance of their heirship, but the legislature has the power to provide for a different line of inheritance. (p. 540.)

**CHILDREN, Adopted, Effect of Change of Law of Inheritance After the Adoption.**—Though at the date of its adoption a child may not be entitled to take as heir at law of the adopting parent, a subsequent enactment giving adopted the same right of inheritance as other children of the adopting parent operates for the benefit of a previously adopted child, though thereby persons who would be heirs at law but for such enactment are deprived of the inheritance. (p. 540.)

**CHILDREN, ADOPTED, Right of to Property Held in Trust for Adopting Parent for Life and at His Decease for His Heirs at Law.**—Under a conveyance transferring real property to a trustee, to be held for the use of a designated beneficiary during her natural life, and at her decease to her heirs at law, a child subsequently adopted by the beneficiary is, upon her death, entitled to take under such conveyance as heir at law of the original beneficiary. (p. 544.)

John D. Henderson and Charles Bell, for the appellants.

John R. Abney and John M. Harrington, for the respondent.

**131 HISCOCK, J.** This action was brought by plaintiff for the purpose of having it adjudged that she, an adopted daughter, was the heir at law of one Frances J. Thomas, and as such entitled to take certain real estate under a deed which conveyed said real estate to the use of Mrs. Thomas during life and after her decease to her heirs at law. The appellants are brothers of Mrs. Thomas, and by their demurrer to the complaint, which fully sets out the facts, challenge the right of plaintiff to take as an heir at law under the circumstances of this case.

I am led to the conclusion that plaintiff's claim is well founded, and that the judgment appealed from should be affirmed.

In 1853 Eliza Hunt conveyed land to one Findlay as trustee of Frances J. Dyett (afterward Thomas), "in trust for the use and benefit of said Frances J. Dyett during her natural life and after her decease to her heirs at law, except that the said party of the first part does hereby expressly authorize and empower the said party of the second part as such trustee as aforesaid . . . to sell and convey said lands and premises . . . and the money or proceeds of said sale to be invested as soon as conveniently may be in other real estate in the name of the party of the second part for the use of said Frances during her life and after her decease to her heirs at law, and if the sale of said lands should be made, the money or proceeds of said sale shall until reinvested again be considered as land and held in trust for the benefit of said Frances during her life and after her decease to her heirs at law." The defendant trust company has been appointed trustee in the place of said Findlay.

In December, 1883, said Frances J. Dyett, who had been intermarried with Francis H. Thomas, and her said husband, pursuant to the provisions of chapter 830 of the Laws of 1873, entitled "An act to legalize the adoption of minor children by adult persons," duly adopted plaintiff, who then was an infant, as and for their own lawful child, and thereafter said persons so adopting and the plaintiff herein sustained toward <sup>132</sup> each other the mutually acknowledged relation of parent and child.

The husband died in the year 1888, and Mrs. Thomas died February 24, 1905, leaving her surviving no issue or descendants thereof.

At the time the deed was executed, and at the time Mrs. Thomas died, except for plaintiff, appellants, her brothers, were her sole heirs at law and next of kin, upon the assumption that their father was dead.

There appears to have been at the date of the death of Mrs. Thomas some accumulation of personal property as the result of the trust in her favor. and no question is made by the appellants that such personal property should pass to the plaintiff. The only question arises with reference to the inheritance of the real estate.

The appellant's demurrer, which in effect denies plaintiff's right to take said real estate under the provisions of the deed, rests upon two distinct propositions.

In the first place they urge that they, being the only heirs at law of Mrs. Thomas when the deed was executed, took a vested right to the remainder in the real estate upon her death, which could not be defeated by the subsequent adoption of the plaintiff. And, secondly, they insist that whether his first proposition be maintained or not, the plaintiff, under the statutes defining the rights of inheritance of adopted children, was not an heir at law who could take the real estate. I shall consider these propositions in the order stated.

The first one may be somewhat briefly disposed of. I do not regard it essential to consider in detail the arguments which have been addressed to us for the purpose of determining whether the rights of appellants under the clause of final disposition in the deed at the time of its execution were in the nature of a contingent remainder or of a vested remainder, which would be divested by death before the death of the life beneficiary or which would open to admit other heirs arising before that event. Whatever disagreement there might be about the technical definition to be given to appellants' position <sup>133</sup> as the only heirs of law of Mrs. Dyett when the deed was executed, I regard the law as well settled which, so far as concerns the practical question in this case, governs the construction of the clause of remainder and fixes the time as of which the heirs at law under it are to be ascertained. The general rule applicable to the facts here presented is well established that when property at a future date is to pass to a certain class of persons, it will be distributed among the persons who compose such class at the date of distribution: *Paget v. Melcher*, 26 App. Div. 12, 49 N. Y. Supp. 922; affirmed, 156 N. Y. 399, 51 N. E. 24; *Matter of Baer*, 147 N. Y. 348, 41 N. E. 702; *Bisson v. West Shore R. R. Co.*, 143 N. Y. 125, 38 N. E. 104; *McGillis v. McGillis*, 11 App. Div. 359, 42 N. Y. Supp. 921.

Therefore, whatever may have been the legal situation of the appellants at the time when the conveyance was made, as defined in terms of legal phraseology, if before the death of Mrs. Thomas other persons rather than they had become the heirs at law, such latter persons are to be regarded as answering the requirements and taking the benefits of the grant.

It is conceded, as I understand it, by the learned counsel for the appellants, that if the life beneficiary had left her surviving a natural child, such child would have been her heir at law to the exclusion of the appellants and would have taken the real estate, but it is insisted that Mrs. Thomas could not, by the artificial process of adoption, create an heir who would divert the course of title of the real estate from the persons who were the natural heirs at law. And we are thus brought to the consideration of the second question above outlined, whether plaintiff was an heir at law for the purpose of taking the real estate in question. This involves an examination of the statutes relating to the rights of adopted children.

The act of 1873, under which plaintiff was adopted, excluded her from any right of inheritance. After other enactments upon the subject which are immaterial here, chapter 272 of the Laws of 1896 (domestic relations law) was adopted, which at the date of the death of Mrs. Thomas provided (section 60): "Nothing in this article in regard to an adopted child inheriting from the foster parent applies to any will, devise <sup>184</sup> or trust made or created before June 25, 1873, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust, a child adopted before that date is not an heir so as to alter estates or trusts, or devises in wills so made or created."

Section 64 of said act and article, as amended by chapter 408, Laws of 1897, provided that the adopted child should take the name of the foster parent, and that "the foster parent or parents and the minor sustain toward each other the legal relation of parent and child and have all the rights, and are subject to all the duties of that relation, including the right of inheritance from each other, . . . and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting, but as respects the passing and limitation over of real and personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of remaindermen." These are the provisions which were in force at the time plaintiff's rights of

inheritance accrued, if at all, and by them we are to test and measure such rights.

It is too well established to require any discussion that the relationship of appellants to Mrs. Thomas which originally made them her heirs at law, did not confer any vested right during the life of the sister to the continuance of such heirship, but that the legislature had the power to change this and provide for a different line of inheritance; also, that a child adopted under the provisions of the act of 1873 giving no right of inheritance is entitled to the benefit of the statute enacted subsequently to the adoption conferring such right: *Dodin v. Dodin*, 16 App. Div. 42, 44 N. Y. Supp. 800; *Theobald v. Smith*, 103 App. Div. 200, 92 N. E. 1019.

The only query is whether the statutes in force at the time when it became necessary to determine the identity of the heirs at law of Mrs. Thomas did or did not make plaintiff one of those heirs.

<sup>135</sup> We set out upon the inquiry confronted and governed by the general provision above quoted that an adopted child is clothed with the right of inheritance from its foster parent. This right not only extends to it personally, but through it to its heirs and next of kin. The commanding force of the statute secures to it in these respects the same rights which would be conferred by natural and blood relationship, except as those rights are limited by certain qualifications and exceptions. The plaintiff, therefore, can justify her claim to inheritance under the general rule, unless she can be brought fairly within the exceptions or qualifications of which, as the only ones pertinent, quotation has already been made.

It seems easy to determine that the facts of this case do not bring her within that prohibition of section 64 which prevents an adopted child from defeating by inheritance the passing and limitation over of property dependent upon a foster parent "dying without heirs." The mere reading of the deed in question makes it as plain as discussion could that the present one is not a situation coming within the terms of this provision. I do not understand that it is claimed otherwise.

But reliance is placed by appellants upon the clause quoted from section 60, and while there may be more basis



for discussion of the effects of this than of the one just considered, nevertheless, I do not think that a careful analysis and fair construction of this clause justifies the conclusion that it prohibited plaintiff from inheriting as heir of Mrs. Thomas.

The final sentence thereof, "That as to any such will, devise or trust . . . (one made or created before June 25, 1873), a child adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created," may be at once dismissed as inapplicable for the reason that the plaintiff was not adopted before the date in question. This leaves for consideration the provision that "Nothing in this article in regard to an adopted child inheriting from a foster parent applies to any will, devise or trust made or created before June 25, 1873, or alters, interferes with or changes <sup>136</sup> such will, devise or trust." The language employed is not altogether apt, and I suppose that its fair translation would be that the right of inheritance conferred upon an adopted child should not permit it to take under any will, devise or trust made or created before June 25, 1873, or to alter, interfere with, or change the effect of such will, devise or trust. I do not discover that it has thus far been claimed by anyone that the inheritance by plaintiff would be under or by virtue of any will or devise, or would alter, change or interfere with the provisions of any will or devise. The meaning of those terms is so well settled and so confined to a testamentary disposition of property that it would be quite violent to so extend their scope as to include a grant and conveyance by deed, even though the latter in some respects may have answered the purpose of a last will and testament.

If it should be urged that there is no reason why the legislature prohibiting an adopted child from interfering by inheritance with wills and devises should not extend such prohibition to a deed largely answering the purpose of a will and devise, it must be answered that it was for the legislature to determine what they would and would not include in their enactments, and if through intention or even inadvertence they have fairly failed to provide for such a case as is presented here, we cannot supply such omission by any process of improper construction.

The more insistent argument has been upon the prohibition of inheritance under or interference with a "trust" made or created before June 25, 1873.

I doubt if it would be claimed that the plaintiff's standing as an heir is undermined and destroyed by this provision if we give to the language its ordinary meaning and construe the statute and the deed as they have actually been written rather than to the end of accomplishing some particular result.

The only "trust" was created for the benefit of Mrs. Thomas (Dyett) during her life. The deed ran to the grantee "as trustee of Frances J. Dyett," and it was "in trust for <sup>187</sup> the use and benefit of the said Frances J. Dyett during her natural lifetime," and after her decease to her heirs at law; the trustee was permitted to do certain things as he should consider "for the best interests of the said Frances." The purpose of the trust and the functions of the trustee were all accomplished and discharged when Mrs. Thomas died, and after that event the property passed without the aid of any trust to her heirs.

No suggestion is made in the complaint or by the appellants that there will be any necessity even for a formal conveyance by the trustee. The heirs at law will take the legal title under the remainder clause of the deed after the trust has been fully executed, and the succession by them to the title will be as independent of the trust as if provided for in a separate instrument. Under those circumstances, it does not seem to be the natural construction to say that the plaintiff will take under or in any manner alter, change or interfere with the only trust which was created.

But, in substance, it was reasoned in the dissenting opinion of the learned justice in the appellate division and has been argued upon this appeal that when the grantor provided for remainder to the heirs at law of Mrs. Thomas, he contemplated heirs of the blood, and that, therefore, it would be unjust to allow her to create one by legal proceedings, and that we ought to seek out some process of reasoning or construction which will avoid violation of the grantor's intentions. And the suggestion is made that we may construe the word "trust" in the statute as broad enough to include the deed in part devoted to creating the trust, and regard the entire conveyance as impressed with the nature of a trust

because it is in part devoted to creating one. In other words, it is urged that the court, if possible, ought somewhat to adapt its interpretation of the deed and statute to the end to be reached, and that end is the prevention of a creation by adoption of an heir who will displace natural heirs, and disappoint what is assumed to have been the expectations of the grantor.

I cannot concede that any sufficient reason exists why we should depart from the natural interpretation of the statute, <sup>128</sup> as I have attempted to outline it, and adopt the latter one as a matter of policy, even if we could. In the first place, since the legislature has deemed it wise as a matter of general policy to authorize the adoption of children and to confer upon them in general the rights as well as obligations of natural children, we should be careful not unreasonably to limit those rights for the purpose in some given case of carrying out the assumed intention of some individual. But further than this, the argument that the intention of the grantor will be violated by allowing plaintiff to inherit, while superficially a potential one, does not stand the test of careful analysis. Of course, the donor when he executed his deed could not apprehend that at a given date many years hence statutes would be enacted providing for the adoption of children and conferring upon them the right of inheritance. But, upon the other hand, he must be assumed to have known that the lines of inheritance were governed by statute and at any time could be changed. He was evidently interested in providing for the life beneficiary in a certain definite manner down to the moment of her death, and did so. But after that, apparently, he had no desire to limit the succession of his real estate to any particular definite line of persons. He directed generally that it should go to her heirs at law; that is, to the persons whom the law should designate as her heirs when the time arrived. He threw the responsibility of selection upon the law. He took his chances upon the happening of just what did happen. There is nothing to show that he was related by blood to Miss Dyett and her heirs, and if the statute gave her the right and she desired in default of children to adopt plaintiff, and by force of law establish in all other respects the same relationship of parent and child which natural birth would have created, I am not able to think that the passage

of the grantor's real estate to such child will be any serious violation of his desire and direction that it should go to her heirs at law.

As was said in *Kohler's Estate*, 199 Pa. 455, 49 Atl. 236, with reference to an adopted child: "The will of John Kohler, father of the cestui que trust, was written thirty-six years <sup>139</sup> before the decree of adoption, and that event, therefore, was not reasonably within the contemplation of the testator. But, as he gave the estate to those persons to whom the law would give it in case of intestacy, he cannot be said to have had any particular class of heirs or next of kin in view, and he committed the question of determining who should take it to the law itself."

The judgment should be affirmed, with costs. Question certified answered in the affirmative, with leave to defendants to withdraw demurrer and answer within twenty days on payment of costs.

Gray, Edward T. Bartlett and Chase, JJ., concur.

Cullen, C. J., O'Brien and Werner, JJ., dissent.

Judgment affirmed.

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*The Adoption by One Person of the Children* of another is the subject of a note to *Van Matre v. Sankey*, 39 Am. St. Rep. 210. An adopted child is, in a legal sense, the child both of its natural and of its adopting parents, and is entitled to inherit from each as their child: *Clarkson v. Hatton*, 143 Mo. 147, 65 Am. St. Rep. 635. If a child is adopted after the making of a will by its adopting parent, in which it is not mentioned, it takes the same share in his estate as would a child born to him after the execution of the will. And the adoption of a child revokes a prior will made by the adopting parent, where the statutes declare that the birth of a child to a testator operates as a revocation of his will: See the note to *Van Darilyn v. Mack*, 109 Am. St. Rep. 678.

## JOHNSON v. CITY OF NEW YORK.

[186 N. Y. 139, 78 N. E. 715.]

**MUNICIPAL ORDINANCE Authorizing the Racing of Automobiles, When Invalid.**—A special ordinance purporting to authorize specified persons to use a highway as a racecourse for automobiles on a particular occasion is invalid as a regulation of the speed of automobiles, and also because it is a participation by a city in the commission of an unlawful act, and an attempt to appropriate a public highway to a private purpose. (p. 547.)

**AUTOMOBILE RACE, Persons Injured at, When not Entitled to Recover of a Municipality Purporting to Authorize.**—Though a special ordinance purporting to authorize the use of a public highway at a time and place designated for a race between automobiles is invalid, and hence cannot authorize such use nor the racing of such automobiles at a rate of speed forbidden by law, yet one who goes to, and remains in the vicinity of, the highway solely for the purpose of witnessing the race cannot recover of the municipality enacting such ordinance for personal injuries resulting from an accident due to the high rate of speed of one of the participating automobiles. (p. 552.)

John J. Delany, corporation counsel, James D. Bell, Charles F. Brown, W. W. Niles and John G. Milburn, for the appellants.

Stillman F. Kneeland, for the respondent.

<sup>143</sup> CULLEN, C. J. This action was brought to recover damages for personal injuries suffered by the plaintiff by being struck by an automobile while witnessing a speed test or race of the machines in a public highway in the borough of Richmond, city of New York. The highway, which was in an outlying part of the city, and known as the Southside boulevard, had been used as a resort for fast driving for a number of years. The race or speed contest was conducted by sending the automobiles, one at a time, over a measured distance on the highway. It was held under the assumed authority of the following resolution adopted by the <sup>144</sup> board of aldermen: "Resolved, That upon the recommendation of the Local Board, First District, Borough of Richmond, permission be and the same hereby is given to the Automobile Club of America to conduct speed trials for automobiles on the Southside Boulevard, in the Fourth Ward of the Borough of Richmond, on Saturday, May 31st, 1902, between the hours of 11 o'clock A. M. and 4 o'clock P. M., or in case the day be stormy, on the first clear week day thereafter between

the same hours, and that during said hours on said day a speed of greater than eight miles per hour may be attained, to which end any and all ordinances regulating the speed of vehicles is hereby suspended, such suspension to continue, however, only for the day and place on which the privilege herein mentioned and conveyed is exercised; and provided, further, that the said Automobile Club of America furnish all proper police protection over that part of the Southside Boulevard over which the said trials are to be conducted."

The plaintiff was present as a spectator. She came from her residence about five miles away in company with her husband and others, as she said, "to see the races." She first witnessed the race from the highway, but finding a better view could be obtained, she passed from the highway into an adjacent clump of woods and there remained. Many automobiles went over the course without mishap. Finally, one machine, moving at the rate of about a mile a minute, by some mischance was deflected from the road into the woods and struck and injured the plaintiff. At the conclusion of the evidence, the learned trial judge, over the objection and exception of the several defendants, directed a verdict against them all on the ground that the speed contest was unlawful and a nuisance, and submitted to the jury only the question of damages. That judgment has been affirmed by the appellate division, and from the judgment of the appellate division this appeal is taken.

It may be conceded that the action of the city in authorizing the use of a public highway as a racecourse for automobiles competing against time was illegal, and that the act of <sup>145</sup> the other defendants in holding the race under that permission was equally illegal. Under the law at the time of this accident, any person driving or operating an automobile or motor vehicle upon any highway within any city or incorporated village at a greater rate of speed than eight miles an hour, "except where the greater rate of speed is permitted by the ordinance of the city," was guilty of a misdemeanor: Laws 1902, c. 266. The special ordinance under which the race took place was passed by the common council on April 15, 1902. That this ordinance, which did not assume to authorize the operation of automobiles generally at a greater rate than that prescribed in the statute, and permitted only certain specified persons to use the high-

way as a racecourse on a particular occasion, was not only invalid as a regulation of the speed of automobiles, but also operated as a participation by the city in the commission of the unlawful act, is settled by the recent decision of this court in *Landau v. City of New York*, 180 N. Y. 48, 105 Am. St. Rep. 709, 72 N. E. 631. In that case the plaintiff was injured by a discharge of fireworks in a city street. There had been a general ordinance passed by the municipality which forbade the discharge of fireworks in the streets. A short time prior to the accident the common council passed a resolution suspending the ordinance so far as it might apply to the meetings or parades of political parties during the election campaign of 1902, the suspension to continue till November 10th of that year. It was conceded by this court that the municipality would not have been liable for failure to enact general ordinances restricting or forbidding the discharge of fireworks, and it was contended that the action of the common council was a mere repeal pro tanto of the previous ordinances, a repeal for which the city could not be held liable any more than for a failure to pass the original ordinance. This court took a different view, and held that the resolution authorizing the discharge of fireworks at political meetings and parades was not an exercise of the power possessed by the local authorities to regulate the use and discharge of fireworks, but merely an unlawful special <sup>146</sup> license or permission to individuals. The action of the defendants was also illegal in other respects than those relating to the rate of speed. It assumed to grant to individuals the right to appropriate the highway for a private purpose, to wit, that of a racecourse, to the exclusion of the public. Authority reposed in the common council by the charter (section 50) "to regulate the use of streets and sidewalks by foot-passengers, animals, and vehicles, to regulate the speed at which vehicles are propelled in the streets," etc., gave no power to divert the highway from public to private use. The authority was to regulate public travel, not to exclude the public. Of course, in the congested condition of many of the streets of the city of New York restrictions, possibly of a somewhat arbitrary character, are necessary to secure public passage along the highway; otherwise intolerable confusion would exist and the streets become blocked so that travelers could move in no

direction. Such regulations are within the power of the municipal authorities. So, also, it may be that the right of the municipal authorities to allow, at certain seasons of the year and on certain streets where it can be safely done, the operation of vehicles at a greater speed than elsewhere permitted and the use of the street for sleighing or coasting, can be sustained. This it is unnecessary to determine. In those cases every member of the public has an equal right to share in the privileges granted in the street. There is no appropriation of it for a private use. The present case is radically different. The occupation of the highway was to be exclusive in the parties to whom the permission was granted. Therefore, the race or speed contest held by the defendants was an unlawful use and obstruction of the highway and per se a nuisance: Pen. Code, sec. 385, subd. 3.

But granting that the action of the defendants in the use of the highway was illegal, the question remains, Was it illegal against the plaintiff so as to render the parties participating therein liable to her solely by reason of the illegality of their acts and regardless of any element of negligence or other misconduct? If the plaintiff had been a traveler on the highway <sup>147</sup> when she met with injury a very different question would be presented. Highways are constructed for public travel, and, as already said, the acts of the defendants were doubtless an illegal interference with the rights of the traveler. It may well be that for an injury to the traveler, or to the occupants of the lands adjacent to the highway, or even to a person who visited the scene of the race for the purpose of getting evidence against the defendants and prosecuting them for their unlawful acts, the defendants would have been absolutely liable regardless of the skill or care exercised. But the plaintiff was in no such situation. She was not even a casual spectator whose attention was drawn to the race while she was traveling in the vicinity. She went from her home, a distance of five miles from the scene of the race, expressly to witness it and to enjoy the pleasure that the contest offered. As to the elements which made the contest illegal she was aware of their existence. She knew it was to take place on a highway, and she knew it was to be a contest for speed, and that, therefore, the automobiles would be driven at the greatest speed of which they were capable. The learned appellate



division has said: "It is possible that a different view might be taken, had it appeared that the plaintiff knew or had any reason to know of the unlawful nature of the contest. There is, however, nothing in the case tending to indicate that she was aware that they were not being conducted under the operation and sanction of a general ordinance or by virtue of a legal and valid permit." It is entirely possible that, as a matter of fact, the plaintiff did not know that the race on the highway was illegal, but it was illegal not from any want of permit, but because there was no statutory power to grant a permit to use the highway for a private purpose. The plaintiff, like every other person, is chargeable with knowledge of law, however ignorant in fact she may have been of it. But it is equally probable that the defendants thought that the race was legal. No distinction can be drawn between the parties in that respect. We are at a loss, however, to see how the legality or illegality of the race affected a person in the <sup>148</sup> condition of the plaintiff. The danger she would encounter in witnessing the race would be exactly the same had there been a statute of the state which expressly authorized it. It does not lie in the mouth of the plaintiff to assert as a ground of liability the illegality of an act from which she sought to draw pleasure and enjoyment. It may be assumed that her mere presence at the race was not sufficient participation therein to render her liable to prosecution as one of the maintainers or abettors of the nuisance (Cooley on Torts, p. 127), though in the case of a prizefight, at common law, all spectators were equally guilty with the combatants of a breach of the peace: *Rex v. Perkins*, 4 Car. & P. 537; *Rex v. Murphy*, 6 Car. & P. 103; *Rex v. Young*, 8 Car. & P. 645. The general maxim, "*Injuria non fit volenti*," applies, and one cannot be heard to complain of an act in which he has participated, if not so far as to render him liable as a party to the offense or tort, at least to the extent of witnessing, encouraging it and seeking pleasure and enjoyment therefrom. Illustrations of this principle may readily be found. It is a misdemeanor to conduct a horserace within a mile of court when the court is in session; also to give a theatrical or operatic exhibition on Sunday. It seems to me absurd that persons obtaining admission and attending the prohibited race or opera and meeting injury there shall successfully assert the illegality of the exhibition

as a ground for recovery. It might with just as much force be contended that the presence of the person injured at the illegal exhibition or spectacle precluded him from recovery against the parties by whose negligence or tort the injury had been occasioned. Such is the law in some jurisdictions, but not so in this state. In *Platz v. City of Cohoes*, 89 N. Y. 219, 42 Am. Rep. 286, the plaintiff, while driving on Sunday for the purpose of pleasure, was injured through a defect in one of the streets of the defendant. It was held that the fault of the plaintiff in driving on the Sabbath did not constitute a defense to the action, and was not to be considered the proximate cause of the accident. We think the same principle applicable here. The acts of the defendant, though <sup>149</sup> illegal, were illegal as against the public and travelers on the highway, not as against the plaintiff. Had the defendants broken into and entered without permission upon private property and conducted the race thereon, doubtless they would have been absolutely liable for all injuries occasioned thereby to the owners or occupants of the land. But what bearing would the trespass have on the defendants' liability to spectators? On the other hand, the plaintiff, to get a better view of the race, entered and stood upon adjacent land. This probably was a trespass on her part. But equally it has no bearing on her right to recover if the defendants were guilty of negligence or other fault. As between the plaintiff and these defendants the legality or illegality of the exhibition given and witnessed, so far as that illegality depends on the obstruction and appropriation of the highway, was not the material factor. It did not create a liability against the defendants if they were at fault in the conduct of the race in no other respect. It does not preclude a recovery by the plaintiff if the injury to her was caused by the misconduct or fault of the defendants.

The view which we entertain is in accord with the law in the state of Massachusetts. In *Scanlon v. Wedger*, 156 Mass. 462, 31 N. E. 642, 16 L. R. A. 395, it was held that a spectator at an exhibition of fireworks, held in a street, could recover only for negligence, the court saying: "If an ordinary traveler upon the highway had been injured different reasons would be applicable; but a voluntary spectator who is present merely for the purpose of witnessing the display must be held to consent to it, and he suffers no wrong

if accidentally injured without negligence on the part of any one, although the show was unauthorized. He takes the risk." From this decision there is a strong dissent, but an examination of the dissenting opinion shows that it was directed rather to the question of negligence than to that of illegality. The case was followed in *Frost v. Josselyn*, 180 Mass. 389, 62 N. E. 469. In Pennsylvania the law has been extended in this direction farther probably than would command our assent. In *Norristown v. Moyer*, 67 Pa. 355, the charge <sup>150</sup> of the trial judge that loitering in the public highway would per se preclude a recovery from the fall of a falling pole seems to have been approved. In this state, where a boiler was being tested on the public highway, it was held that for a traveler to remain in the vicinity after being informed of the danger raised a question of contributory negligence to be determined by the jury. The cases relied on by the learned counsel for the respondent we think are not controlling. The decision in *Bradley v. Andrews*, 51 Vt. 530, is directed to contributory negligence and assumed risks, not to illegality. In *Castle v. Duryee*, 1 Abb. Dec. 327, where the plaintiff was injured by a ball discharged from a gun during the exercises of a militia regiment, the recovery at circuit was on the ground of negligence, a recovery which was upheld by this court. Judge Denio in his opinion thought the recovery might also be sustained on the ground of trespass. The report shows that a majority of the court concurred in the decision. Whether the opinion was also concurred in does not appear. However that may be, Judge Denio states that the plaintiff in that case was unaware that there was to be any discharge of firearms. Here the plaintiff knew that there was to be a test of speed of automobiles, and it was the high speed of the automobile that caused the injury. In *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234, it was held that a defendant who descended in a balloon upon the plaintiff's garden, whereby a great crowd of people broke through the fences and injured his vegetables and flowers, was liable for the consequences of his act, although he might not have invited the crowd. That case would be in point if it had been held that the defendant was also liable to one of the crowd who had been injured while entering into the garden without invitation. In *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668, it was held that the fact that

a child was playing in the street did not prevent her from recovering for injuries occasioned by falling into a dangerous and unguarded area which the defendant had left in the street. This is doubtless authority for the right of the child to play in the street, but <sup>151</sup> it is not authority for the proposition that the defendant would have been liable had the child gone to play with the area by jumping into it and clambering out of it. It must be distinctly borne in mind in this case that as already said the plaintiff was not a casual spectator, whose attention might naturally be drawn to any remarkable occurrence on the highway and thereby loiter for some short period without losing her rights as a traveler, but one who went to the place expressly to see the exhibition.

The learned counsel for the respondent has argued at length that the character of the road, the curve in it, the nature of its pavement, and similar matters rendered it dangerous and improper to conduct a contest by automobiles, and that, considering the number of persons naturally attracted to such a spectacle, the contest was so dangerous as to constitute a public nuisance within the definition of the Penal Code: Pen. Code, sec. 385, subd. 4. Whether a contest as conducted was in fact a nuisance, whether the defendants, or any of them, were guilty of negligence in the management of the race, and the contributory negligence, if any, on the part of the plaintiff, were all questions of fact which the trial court should have submitted to the jury for determination: *McDonald v. Metropolitan St. Ry. Co.*, 167 N. Y. 66, 60 N. E. 282.

For these reasons the judgment of the courts below must be reversed and a new trial had, costs to abide the event.

Edward T. Bartlett, Haight, Hiscock and Chase, JJ., concur.

Gray and O'Brien, JJ., absent.

Judgment reversed, etc.

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*A Municipal Corporation is Liable* for the consequences of an unlawful use of its streets, sanctioned by its permission. Therefore, if an ordinance exists providing that no person shall set off fireworks within the limits of the city, and a resolution is adopted purporting to suspend such ordinance for a time specified so far as it applies

to political meetings and parades, the resolution does not repeal the ordinance, but amounts to a permit to do a prohibited act for a limited period, and makes the city liable for the consequences, as where, through an explosion of the permitted fireworks, personal injuries are suffered by, or death results to, a human being: *Landau v. New York*, 180 N. Y. 48, 105 Am. St. Rep. 709.

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### ULLMAN v. CAMERON.

[186 N. Y. 339, 78 N. E. 1074.]

**PRACTICE.**—The Defense that the Plaintiffs Have not Legal Capacity to Sue cannot be made out by showing that they have not sufficient facts to rest upon. (p. 554.)

**IF A TRUST is Invalid as to Creditors of the Beneficiary,** title to the property vests in him so far as the claim of such creditors are concerned. (p. 555.)

**PRACTICE, Parties to Suit to Recover Property for the Benefit of Creditors Where a Trustee or Receiver Has Been Appointed in Supplemental Proceedings.**—If judgments have been recovered against one for whose benefit property is held under a trust invalid as against his creditors, and a receiver is afterward appointed in proceedings supplemental to execution issued upon such judgments, this appointment does not set aside the lien of the judgments nor prevent such creditors from maintaining suit to reach such property and appropriate it to the payment of their judgments. (p. 555.)

**TRUST, When Invalid as Against Creditors—Attempt to Exempt Property from Execution.**—A will giving all the property of the testatrix to a trustee, to be held by him for the purpose of paying over annually to her husband all of the income thereof necessary for his support and maintenance during his life, and whenever he should wish to engage in any business, to pay over to him so much of the principal as he may desire, and after his death giving the residue to certain other persons, is an attempt to create a trust in fraud of, and therefore void as against, his creditors, and for their benefit the title should be declared to be vested in their debtor and subject to the suit of his judgment creditors. (p. 556.)

**EXECUTION CREDITORS, Property Subject to.**—Property which may become that of a judgment debtor for the asking must be regarded as his for the purpose of satisfying the demands due from him to his creditors. (p. 557.)

Suit by the judgment creditors of Charles E. Cameron against his receiver and also against the remaindermen designated in the will of Jane N. Cameron, deceased. By it she devised and bequeathed all her property to Albert L. Cameron, whom she also appointed executor in trust, (1) to pay over to her husband, Charles E. Cameron, semi-annually, all of the income, rents, issues, and profits thereof, and so much of the principal as might be necessary for his support

during his natural life; (2) if he should desire to engage in any business or enterprise, and should give notice to the trustee that he desired the whole or any part of such principal for such purpose, then to pay over and deliver the amount so desired out of the principal sum so given in trust. Whatever should remain in the hands of the trustee after the death of the husband was by the will given to the sister of the testatrix and the sister and brothers of the husband, share and share alike.

When Mrs. Cameron died, in January, 1900, she left some household furniture and a bond secured by a mortgage on certain real property, which, in satisfaction of such mortgage, was conveyed in June, 1901, to said Albert L. Cameron, to be held "as trustee, as aforesaid." July 11, 1901, a judgment was recovered against Charles E. Cameron in favor of the complainants, and afterward an execution issued thereunder which was returned unsatisfied, and a receiver was appointed in proceedings supplementary to execution.

The prayer of the bill was that the trust purporting to be created by the will be declared void as against the plaintiffs, and the property conveyed by the trustee be charged with the payment of their judgment.

The defendant A. E. Cameron demurred on the grounds, first, that the plaintiffs had no capacity to sue, in that the title is in the receiver appointed in the supplementary proceeding; second, that there is a defect of parties plaintiff, in that, if any cause of action exists, it is in favor of such receiver; and third, that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled by the trial court, whose judgment was sustained on appeal to the appellate division, with leave to appeal to the court of appeals.

M. H. Kiley, for the appellant.

T. B. Merchant and L. M. Merchant, for the respondents.

<sup>343</sup> VANN, J. That the plaintiffs were under no legal disability, such as infancy, lunacy, or the like, and hence had a legal <sup>344</sup> capacity to sue, cannot be seriously disputed according to the authorities, which make a clear distinction between "incapacity to sue" and "insufficiency of facts to sue upon": Ward v. Petrie, 157 N. Y. 301, 68 Am

St. Rep. 790, 51 N. E. 1002; *Bank of Havana v. Magee*, 20 N. Y. 355.

The appellant, however, contends that the receiver is not a proper party defendant because he should have been the sole plaintiff, and that the respondents are not proper parties plaintiff inasmuch as the cause of action, if any is set forth, belonged exclusively to the receiver.

If the trust is valid as to creditors, title to the property covered thereby vested in Charles E. Cameron, the judgment debtor, in January, 1900, when his wife died, at least so far as the claims of the creditors are concerned. The plaintiffs recovered their judgment in July, 1901, and during that month the most of the property was converted into real estate through the conveyance of the land covered by the mortgage to the trustee. The plaintiffs' judgment thus became a lien upon said real estate in July, 1901, and they had a cause of action in equity to set aside the trust as to them and enforce their lien. In February, 1902, the receiver was appointed, but that did not transfer the lien of the plaintiffs' judgment to him. He took the land subject to their lien. They still owned it and had a right to enforce it. They had a cause of action for that purpose which was exclusively their own, and in which he had no interest. They did not assign their judgment to him by procuring his appointment, nor did they thereby assign their lien to him, or estop themselves from enforcing it. Conceding that the property which was still personalty when the receiver was appointed vested in him with the exclusive right to appropriate it to the payment of the plaintiffs' debt, still he had no right to the lien of the plaintiffs' judgment on the real estate, and hence they had a cause of action, which never vested in him. He could acquire a lien by filing a bill in equity, while they already had one but needed equitable aid to enable them to enforce it. They could sell under execution and sue afterward to clear the <sup>345</sup> title but he could not. The parties named had different rights as to the real estate, and were entitled to separate remedies: *Gere v. Dibble*, 17 How. Pr. 31; *Bennett v. McGuire*, 58 Barb. 635.

The final question is whether the complaint sets forth a cause of action, independent of the questions already passed upon. That question was considered by the appellate division upon an appeal from a judgment rendered for the de-

fendants upon the merits before the complaint was amended: *Ullman v. Cameron*, 92 App. Div. 91, 87 N. Y. Supp. 148. We adopt the language of the learned presiding justice, when, speaking for the court and referring to Charles E. Cameron, he said: "Now he was evidently entitled to the possession of such fund if he demanded it for the purpose of engaging 'in any business or enterprise'; and it seems to me that such a purpose is so broad and so personal to the beneficiary that it is equivalent to a direction that he is entitled to it whenever he asks for it."

The intention of the testatrix, as we glean it from the will, was to give the property to her husband, and yet keep it from his creditors. The trust was an obvious pretext for that purpose. There was but a single trust, for the gift was of all the property to one person in trust for one person during his life with remainder over to others. The "uses and purposes" named as the object of the trust include the right of the beneficiary to take the corpus of the estate at will, by simply notifying the trustee that he wishes to engage in some business or enterprise. He is not obliged to actually engage in any business or enter upon some enterprise, but simply to say that he desires the property for either purpose, when the trustee has no discretion, but is required to pay whatever is asked for, even to the extent of the whole fund. Although possession and title are thus subject to his control, it is insisted that until he calls for possession the property is not liable for his debts. The law will not endure this when creditors ask its aid to prevent it, but will declare the estate vested as to them as we did in *Wendt v. Walsh*, 164 N. Y. 154, 58 N. E. 2. <sup>346</sup> Whether the trust should be sustained as to the persons named in the will, as distinguished from the creditors, need not now be passed upon. Unlike the cases cited, which held the trust then under consideration to be a naked trust, in this case a trust term is defined, and it may be that any property left at the death of the chief beneficiary will pass to the remaindermen and the intent of the testatrix thus carried out as far as possible. As to creditors, however, the trust cannot stand, for it is opposed to public policy as declared by statute and by the decisions of the courts: 1 Rev. Stats. 727; Real Property Law, secs. 71-73, 129; *Hallett v. Thompson*, 5 Paige, 583;



Frazer v. Western, 1 Barb. Ch. 220; Wendt v. Walsh, 164 N. Y. 154, 58 N. E. 2; Chaplin on Trusts, 585.

In Hallett v. Thompson, 5 Paige, 583, Chancellor Walworth declared that it was "contrary to sound public policy to permit a person to have the absolute and uncontrolled ownership of property for his own purposes, and to be able at the same time to keep it from his creditors." That case was cited and the language of the chancellor substantially quoted with approval by Judge Rapallo in Williams v. Thorn, 70 N. Y. 270, and it has received the approval of many courts in this state and elsewhere.

The doctrine is sound and applies to this case, for, as to my creditors, property is mine which becomes mine for the asking, and no words can make an instrument strong enough to hold it for me and keep it from them.

The order should be affirmed, with costs, and the questions certified answered in the negative.

Cullen, C. J., Haight, Werner, Willard Bartlett and Hiscock, JJ., concur.

Gray, J., absent.

Order affirmed.

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*Spendthrift Trusts* are discussed in the notes to *Garland v. Garland*, 24 Am. St. Rep. 686; *Smith v. Towers*, 9 Am. St. Rep. 405. A spendthrift trust is one created for the maintenance of the cestui que trust and to secure the fund against his improvidence. In order to create such a trust, the gift to the donee must be of the income only; the legal title must be vested in the trustee; and the trust must be an active one, not a mere dry trust which may be executed under the statute of uses: *Kessner v. Phillips*, 189 Mo. 515, 107 Am. St. Rep. 368; *Wenzel v. Powder*, 100 Md. 36, 108 Am. St. Rep. 380.

## PLATT v. ELIAS.

[186 N. Y. 374, 79 N. E. 1.]

**THE PRESUMPTION of Undue Influence Arising Out of Illicit Sexual Relations Between the Parties**, as where a man makes gift of great value to his mistress, is not one of law, but one of fact merely, susceptible of being rebutted by evidence. (pp. 560, 561.)

**GIFTS Founded upon Illegal or Immoral Consideration.**—A court of equity will not interfere in the recovery of property given by a donor to a donee for an immoral consideration, as where a man gives large sums to his mistress. (p. 562.)

Action to recover, and impose a trust upon, money amounting to nearly seven hundred thousand dollars given by the plaintiff to his mistress, and which he claimed was extorted from him. The finding of the trial court excluded the question of extortion, but established that the moneys had been given to the mistress during the maintenance of illicit relations. The judgment was in her favor, and it was affirmed by the appellate division of the supreme court of the first judicial department.

Lyman E. Warren and Ira D. Warren, for the appellant  
Daniel Daly for the respondent.

**378 BARTLETT, J.** In view of the findings of fact made by the trial court, and the unanimous affirmance by the appellate division, I am unable to perceive any ground which would justify us in interfering with this judgment. So far as the express allegations of the complaint are concerned, the learned judge at special term has found that the respondent did not commit any of the acts of blackmail or extortion which are charged therein. These findings being amply sufficient to sustain the conclusions of law and having been unanimously affirmed by the appellate division leave no question open for consideration in this court, unless it be true, as is contended in behalf of the appellant, that notwithstanding the absence of any specific averment of undue influence in the complaint, the trial court was bound to presume the existence and exercise of such influence by reason of the facts which were found as to the illicit sexual relations between the appellant and the respondent at the time of making the gifts, which are the subject of attack in this suit.

The learned counsel for the appellant invokes the doctrine which is nowhere better stated than by Mr. Justice Cooley in his well-known work on the Law of Torts, in these words: "Where a transaction is brought about while the parties are living in illegal sexual relations, it is always open to suspicion of fraud or <sup>379</sup> undue influence, and if it is a gift or a sale for an inadequate consideration, or if it is specially beneficial to one party rather than to the other, the party benefited by it will be under the necessity of showing that no advantage was taken and that it was the result of free volition": 2 Cooley on Torts, 3d ed., 982.

The proposition presented for our sanction is that the rule thus laid down made it the duty of the judge at special term to find that the gifts from the appellant to the respondent were induced by the exercise of undue influence as soon as he was convinced that the donor was maintaining the donee as his mistress. This proposition necessarily rests upon the hypothesis that the presumption of undue influence arising out of illicit sexual cohabitation is a presumption of law rather than a presumption of fact. If this view as to the character of the presumption be correct, then proof which establishes the existence of the illicit relation would necessarily demand the inference that gifts made during the continuance of that relation were brought about by the exercise of undue influence; for a presumption of law is a rule which requires that a particular inference must be drawn from an ascertained state of facts. If, on the other hand, the presumption of undue influence in the case of a gift by a man to a woman with whom he had a meretricious connection is only a presumption of fact, it merely warrants the trial court in deducing the exercise of undue influence from the fact that the sexual relations between the parties were improper, but does not absolutely demand that such an inference shall be drawn from that fact. In other words, a presumption of fact leaves the trial court at liberty to infer certain conclusions from a certain set of circumstances, but does not compel it to do so.

An examination of the various cases relied upon to support the position of the appellant shows quite clearly, I think, that the presumption of undue influence in respect to gifts by a man to his mistress has generally been regarded by the courts as a presumption of fact. The case of Dean

v. Negley, 41 Pa. 312, 80 Am. Dec. 620, was a feigned issue to determine the validity <sup>380</sup> of the will of one William Johnston. The parties opposing the will offered to prove, upon the trial, among other things, that Johnston, both before and after the death of his wife, maintained a continuous adulterous intercourse with a Mrs. Bolton, who was the mother of the children to whom he had devised the bulk of his estate. It was held that the trial court erred in refusing to receive proof of the relation between the testator and Mrs. Bolton. The opinion of the supreme court was delivered by Lowrie, C. J., who said: "There can be no doubt that a long-continued relation of adulterous intercourse is a relation of great mutual influence of each over the mind and person and property of the other. History abounds with proofs of it, and it requires no very long life, or very close observation of persons around us, in order to reveal the fact. . . . If, then, there was such a relation between the testator and Mrs. Bolton at the time of making the will, as was offered to be proved, we think that that fact, taken in connection with the devise to Mrs. Bolton's daughters, is evidence of an undue influence exerted by her over the testator, and affecting the dispositions of his will, and that it may justify a verdict against the validity of the will. I have, myself, thought that it raised a presumption of undue influence, but we do not so decide, but leave it as a question of fact merely." Here we have a distinct refusal by the supreme court of Pennsylvania to treat the presumption as one of law. In other states, where it has been asserted that the exercise of unlawful influence will be presumed in cases where the parties to a gift live in adulterous or illicit relations in the absence of proof of a legal consideration, I find nothing in the language of the courts which conveys the idea that they regarded the presumption as one which must be adopted, as would be the case if it were deemed a presumption of law. The import of the decisions is merely that the jury or the chancellor, as the case may be, will be justified in assuming the exercise of undue influence under such circumstances so as to impose upon the donee the burden of establishing a lawful consideration, but <sup>381</sup> that the rule which permits this to be done is not imperative upon the trial court so as to constrain it to reach that conclusion: Shipman v. Furniss, 69 Ala. 555, 44 Am. Rep. 528; Leighton

v. Orr, 44 Iowa, 679; Hanna v. Wilcox, 53 Iowa, 547, 2 N. W. 717. In the case last cited an attack was made upon a conveyance executed by a deceased grantor to a woman with whom he was living in adulterous relations at the time when the deed was made. "The exercise of unlawful influence," said the supreme court of Iowa, "will be presumed where the parties to a deed live in adulterous relations in the absence of proof of a lawful consideration." This remark must have been intended to assert the rule stated as a presumption of fact rather than a presumption of law, because the case was triable in the supreme court de novo and the opinion was rendered at the conclusion of the trial therein.

Irrespective of judicial authority in other states, however, and even if a different view prevailed elsewhere, I think it is carrying the rule of evidence applicable to such cases as that before us far enough to hold that the presumption under consideration is simply a presumption of fact which will sustain a judgment based upon undue influence if the trial court chooses to adopt it, but which the trial court is not constrained to adopt. I see no reason why the presumption here should be any stronger than that which arises in a prosecution for larceny by reason of the recent possession of stolen goods. While the recent possession of stolen property by a person is held to raise a presumption of guilt it is not one which necessarily requires a conviction but is merely a fact for the consideration of the jury under all the circumstances of the case: *People v. Weldon*, 111 N. Y. 569, 19 N. E. 279. In the case at bar the appellate division recognized that the relations between the appellant and the respondent had been proven to be such as would have authorized a presumption of undue influence by the trial judge if he had seen fit to make it; but the opinion goes on to declare that such presumption was entirely overcome by the testimony of the plaintiff himself. In other words, the appellate division has held, correctly, as I think, <sup>352</sup> that the presumption was not absolute, and has further asserted, in the exercise of its powers to deal exclusively with the facts, that the learned trial judge did right in rejecting it.

While it may seem unfortunate that the effect of the present judgment is to leave in the possession of the respondent

a very large sum of money which she obtained from the appellant as his mistress, it is to be observed that the courts below have found in effect that the payments were wholly voluntary. If it be true that they were induced by the sexual intimacy between the parties, a court of equity could not interfere at the instance of the donor to enable him to recover his money, inasmuch as the gift has been fully executed and the consideration was plainly immoral. Where illicit sexual intercourse is the consideration for the payment of money and the money has been paid, the courts will not aid the donor to recover it back any more than they would enforce in behalf of a woman the unexecuted promise of a man to pay her money in consideration of such intercourse: 2 Schouler on Personal Property, 3d ed., sec. 61. "That which one promises to give for an illegal or immoral consideration he cannot be compelled to give; and that which he has given on such a consideration he cannot recover. The law will not afford relief to either party, in *pari causa turpitudinis*; but leaves them just where they have placed themselves": *Monatt v. Parker*, 30 La. Ann. 585, 31 Am. Rep. 229.

I find no error of law in this record; the determination of the courts below upon the question of fact is not reviewable here; and I, therefore, advise the affirmance of the judgment, with costs.

Cullen, C. J., Haight, Vann, Werner and Hiscock, JJ., concur.

Gray, J., absent.

Judgment affirmed.

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*The Presumption of Undue Influence*, if any, where a man makes a gift of his property to a woman with whom he is living in meretricious relations, is discussed in the notes to *In re Hess' Will*, 31 Am. St. Rep. 677; *Shipman v. Furniss*, 31 Am. Rep. 537. Past illicit cohabitation does not render void or illegal a gift by a man to the woman with whom he has held such relation: *Smith v. Du Bose*, 73 Ga. 413, 6 Am. St. Rep. 260.

*The Rule of Pari Delicto* is the subject of a note to *Hobbs v. Boatright*, 113 Am. St. Rep. 724.

**BUTLER v. FRONTIER TELEPHONE COMPANY.**

[186 N. Y. 486, 79 N. E. 716.]

**EJECTMENT.**—Though Ouster is Essential to an Action of Ejectment It Need not be Entire or Absolute, for it is sufficient if defendant is in partial possession of the premises while plaintiff is in possession of the remainder. (p. 565.)

**EJECTMENT, When Maintainable.**—The Ability of the Sheriff to Deliver Possession is a Test of the right to maintain ejectment. (pp. 566, 567.)

**EJECTMENT for the Maintenance of a Telephone Wire.**—Ejectment can be maintained against one who strings, a few feet above the surface of the soil, a telephone wire and there maintains it without the consent of the owner. (p. 567.)

Ejectment tried by the court without a jury. The defendant, while the plaintiff was in possession of the premises, entered thereon and stretched across the plaintiff's land a telephone wire about thirty feet above the surface of the soil and across the whole premises. The judgment was in favor of the plaintiff and was affirmed on appeal to the appellate division by a divided vote.

Lyman M. Bass, for the appellant.

George C. Hillman, for the respondent.

<sup>488</sup> VANN, J. The question presented by this appeal is whether ejectment will lie when the soil is not touched, but part of the space a few feet above the soil is occupied by a telephone wire unlawfully strung by the defendant across the plaintiff's premises. This question has never been passed upon by the court of appeals nor by the supreme court, except in the decision now before us for review. Questions similar but not identical, as they related to overhanging eaves, projecting <sup>489</sup> cornices or leaning walls, were decided in favor of the defendant in *Aiken v. Benedict*, 39 Barb. 400, and *Vrooman v. Jackson*, 6 Hun, 326, and in favor of the plaintiff in *Sherry v. Freeking*, 4 Duer, 452. In *Leprell v. Kleinschmidt*, 112 N. Y. 364, 19 N. E. 812, the question as to the effect of projecting eaves was alluded to but not decided, because there was in that case "a physical entry by the defendant upon the land of the plaintiffs and an unlawful detention of its possession from them."

The precise question before us does not appear to have been passed upon in any other state, and upon the cognate question

relating to projecting cornices and the like, the authorities are divided. Some hold that ejectment will lie because there is an actual ouster or disseisin: *Murphy v. Bolger*, 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309; *McCourt v. Eckstein*, 22 Wis. 153, 94 Am. Dec. 594; *Stedman v. Smith*, 92 Eng. Com. L. l. Others hold that there is not such a disturbance of possession as to sustain an action in that form: *Norwalk H. & L. Co. v. Vernam*, 75 Conn. 662, 96 Am. St. Rep. 246, 55 Atl. 168; *Rasch v. Noth*, 99 Wis. 285, 67 Am. St. Rep. 858, 74 N. W. 820, 40 L. R. A. 577. The case last cited does not overrule the earlier case in Wisconsin, but proceeds upon the theory that the aerial space was occupied by the projecting eaves of both parties, one above the other, on opposite sides of the boundary line. Some of the cases hold that a court of equity may order the removal of a projection without deciding whether ejectment will lie or not. Thus, in *Wilmarth v. Woodcock*, 58 Mich. 482, 25 N. W. 475, it was decided that equity would require the removal of a projecting cornice because "no remedy at law is adequate, owing to the uncertainty of the measure of damages, to afford complete compensation." But, as the learned court continued: "No person can be permitted to reach out and appropriate the property of another and secure to himself the adverse enjoyment and use thereof, which, in a few years, will ripen into an absolute ownership by adverse possession": See, also, *Plummer v. Gloversville Electric Co.*, 20 App. Div. 527, 47 N. Y. Supp. 228.

While some of the cases may be harmonized by resort to the distinction between "disseisins in spite of the owner, and <sup>490</sup> disseisins at his election," the main question is open, and must be determined upon principle.

The defendant concedes that the plaintiff has a remedy, but insists that it is an action for trespass, or to abate a nuisance, while the plaintiff claims that ejectment is a proper remedy and one of especial value as it entitles him, if he needs it, to a second trial as a matter of right and to costs, even if he recovers less than fifty dollars damages: *Code Civ. Proc.*, sec. 1525, 3228.

An action of ejectment, according to the code, is "an action to recover the immediate possession of real property": *Code Civ. Proc.*, sec. 3343, subd. 20. While the statute to some extent regulates the procedure, it did not create the action, and



for the principles which govern it resort must be had to the common law: Code Civ. Proc., secs. 1496-1532; Real Property Law, secs. 1, 218; 2 Rev. Stats. 303.

Without entering into the somewhat involved and perplexing learning upon the subject, it is sufficient to say that, as all the authorities agree, the plaintiff must show that he was formerly in possession, that he was ousted or deprived of possession, and that he has a right to re-enter and take possession. It is admitted by the pleadings that when the wire was put up the plaintiff was in possession of the entire premises, and that he was entitled to the immediate possession thereof as owner when the action was commenced. The serious question is whether he was deprived of possession to the extent necessary to authorize ejectment. While ouster is essential to the maintenance of the action, it need not be entire or absolute, for it is sufficient if the defendant is in partial possession of the premises while the plaintiff is in possession of the remainder: *Sullivan v. Legraves*, 2 Strange, 695; *Doe v. Burt*, 1 Term Rep. 701; *Lady Dacre's Case*, 1 Lev. 58; *Rowan v. Kelsey*, 18 Barb. 484; *Otis v. Smith*, 26 Mass. 293; *Gilliam v. Bird*, 8 Ired. 280, 49 Am. Dec. 379; *Reynolds v. Cook*, 83 Va. 817, 5 Am. St. Rep. 317, 3 S. E. 710; *McDowell v. King*, 4 Dana (Ky.), 67; *Adams on Ejectment*, 27; *Newell on Ejectment*, 38; *Warvelle on Ejectment*, 22. Mines, quarries, minerals, oil and an upper room in a house are familiar <sup>491</sup> examples. Is the unauthorized stringing of a wire by one person over the land of another an ouster from possession to the extent that the wire occupies space above the surface as claimed by the plaintiff, or a mere trespass or interference with a right incidental to enjoyment as claimed by the defendant? Was the plaintiff in the undisturbed possession of his land when a portion of the space above it was occupied by the permanent structure of the defendant, however small? Was the space occupied by the wire part of the land in the eye of the law?

What is "real property"? What does the term include so far as the action of ejectment is concerned? The answer to these questions is found in the ancient principle of law: *Cujus est solum, ejus est usque ad coelum et ad inferos*. The surface of the ground is a guide, but not the full measure, for within reasonable limitations land includes not only the surface but also the space above and the part beneath: *Coke's*

Littleton, 4a; 2 Blackstone's Commentaries, 18; 3 Kent's Commentaries, 14th ed., \*401. "Usque ad coelum" is the upper boundary, and while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man. So far as the case before us is concerned, the plaintiff as the owner of the soil owned upward to an indefinite extent. He owned the space occupied by the wire and had the right to the exclusive possession of that space which was not personal property, but a part of his land. According to fundamental principles, and within the limitation mentioned, space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly.

If the wire had touched the surface of the land in permanent and exclusive occupation, it is conceded that the plaintiff would have been dispossessed *pro tanto*. A part of his premises would not have been in his possession, but in the possession of another. The extent of the disseisin, however, does not control, for an owner is entitled to the absolute and undisturbed possession of every part of his premises, including <sup>492</sup> the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed. Where along the line of these illustrations would dispossession begin? What rule has the law to measure it by? How much of the space above the plaintiff's land must be subjected to the dominion of the defendant in order to effect a dispossession? To what extent may the owner be dispossessed and kept out of his own before there is a privation of seisin? Unless the principle of *usque ad coelum* is abandoned, any physical, exclusive and permanent occupation of space above land is an occupation of the land itself and a disseisin of the owner to that extent.

The authorities, both ancient and modern, with some exceptions not now important, agree that the ability of the

sheriff to deliver possession is a test of the right to maintain an action of ejectment: *Jackson v. Buel*, 9 Johns. 298; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Patch v. Keeler*, 27 Vt. 252; *Warvelle on Ejectment*, 34; *Crabb on Real Property*, 710; *Butler's Nisi Prius*, 99. "The rule now is, that when the property is tangible and an entry can be made and possession be delivered to the sheriff, this action will lie": *Nichols v. Lewis*, 15 Conn. 137. The defendant insists that the sheriff cannot give possession of space any more than he can deliver water in a running stream or "air whirled by the north wind." When the space over land is unoccupied, there is no occasion for delivery, because there is nothing to exclude the owner from possession. The sheriff, however, can deliver occupied space by removing the occupying structure. All that he does to deliver possession of the surface of land, or of a mine under the surface, is to remove either persons or ~~403~~ things which keeps the owner out. He does not carry the plaintiff upon the land and thus put him in possession, but he simply removes obstructions which theretofore had prevented him from entering. So, in this case, that officer can deliver possession by removing the wire, the same as he would if one end happened to be embedded in the soil, when no question as to the right to bring ejectment could arise. Where there is a visible and tangible structure by which possession is withheld to the extent of the space occupied thereby ejectment will lie, because there is a disseisin measured by the size of the obstruction, and the sheriff can physically remove the structure and thereby restore the owner to possession.

The smallness of the wire in question does not affect the controlling principle, for it was large enough to prevent the plaintiff from building to a reasonable height upon his lot. The prompt removal of the wire after the suit was brought could not defeat the action because the rights of the parties to an action at law are governed by the facts as they existed when it was commenced: *Wisner v. Ocumpaugh*, 71 N. Y. 113.

The judgment should be affirmed, with costs.

Cullen, C. J., Edward T. Bartlett, Willard Bartlett and Chase, JJ., concur.

O'Brien and Haight, JJ., absent.

Judgment affirmed.

**FOR WHAT PROPERTY OR INVASION OF POSSESSION EJECTMENT IS MAINTAINABLE.**

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**I. Scope of Note.**

In this note we shall not consider questions going to the kind of title or the sufficiency of the interest necessary in the plaintiff in order to maintain ejectment.

**II. General Nature of the Action of Ejectment.**

In a general way, it may be said that ejectment is a form of action in which the right of possession to corporeal hereditaments may be tried and the possession obtained: *Porter v. Garrissino*, 51 Cal. 559; *Doe v. West*, 1 Blackf. 133; *Hoffman v. Beard*, 22 Mich. 59; *Cincinnati v. White*, 6 Pet. 431, 8 L. ed. 452. It is in all of its characteristics a possessory action: *Payne v. Treadwell*, 5 Cal. 310; *Sears v. Taylor*, 4 Colo. 38; *Barco v. Fennell*, 24 Fla. 378, 5 South. 9; *Guyer v. Wookey*, 18 Ill. 536; *Spaulding v. Bartlett*, 55 N. H. 304;

Hoboken Land etc. Co. v. Hoboken, 36 N. J. L. 540; Hubbard v. Godfrey, 100 Tenn. 150, 47 S. W. 81. The action of ejectment has passed through many technical changes. "The evolution of the action of ejectment from its primitive form as a mere action of trespass, enabling a lessee of lands to recover damages when ousted of his possession, through a series of most ingenious fictions, which were afterward added to enable him to recover possession as well, until its final establishment as the proper method of trying all disputed titles to real property, presents to the student of legal science one of the most interesting studies that the history of the law affords. Few remedies have passed through so many changes of form, both in pleading and practice, and yet retained the same distinctive character that marked their origin. It is true that in some states the action, eo nomine, is now unknown, yet the right to recover the same estates, rights and interests in lands remains and is enforced by action as before, and the action to be brought is still an action at law as distinguished from a suit in equity, while in all the forms of the remedy, as they are now used in practice, the essential principles are the same": Warvelle on Ejectment, sec. 4.

But even though statutes regulate the procedure, still they do not create the action of ejectment. The principles which govern it are to be found in the common law: Butler v. Frontier Teleph. Co., 186 N. Y. 486, ante, p. 563, 79 N. E. 716.

### III. Necessity for Plaintiff to be Entitled to the Possession in Order to Maintain the Action.

Ejectment being a possessory action, it is essential that the plaintiff have a right to the present possession of the land sued for. In other words, in order to maintain ejectment the plaintiff must show a right of possession or right of entry in himself: Payne v. Treadwell, 5 Cal. 310; McMasters v. Torsen, 5 Idaho, 536, 51 Pac. 100; Jones v. Lofton, 16 Fla. 189; Barco v. Fennell, 24 Fla. 378, 5 South. 9; Farley v. Craig, 15 N. J. L. 191; Lawrence v. Hunter, 9 Watts, 64; Cincinnati v. White, 6 Pet. 431, 8 L. ed. 452; Love v. Simms, 9 Wheat. 515, 6 L. ed. 149; Kirk v. Hamilton, 102 U. S. 68, 26 L. ed. 79. And as a foundation for a showing of ouster by the defendant, it is necessary for the plaintiff to show that at some time previous to the commencement of the suit he was in the possession of the premises: McMasters v. Torsen, 5 Idaho, 536, 51 Pac. 100; Start v. Clegg, 83 Ind. 78; Crawford v. Corey, 99 Mich. 415, 58 N. W. 532; Lykens v. Whelan, 15 Pa. 483.

### IV. Necessity for the Plaintiff to be Out of Possession at Time of Commencing the Action.

The general rule is that ejectment is maintainable only by one out of possession. Hence, it is essential that it be shown that the defendant was in the possession or occupancy of the premises sued for at the time of commencing the action: Betz v. Mullin, 62 Ala. 365;

Garner v. Marshall, 9 Cal. 268; Shaeffer v. Matzen, 59 Cal. 652; Dillon v. Center, 68 Cal. 561, 10 Pac. 176; Jones v. Lofton, 16 Fla. 189; Scisson v. McLaws, 12 Ga. 166; Reed v. Tyler, 56 Ill. 288; Williamson v. Crawford, 7 Blackf. 12; McDowell v. King, 4 Dana, 67; Garnett v. Garnett's Lessee, 7 T. B. Mon. 545; Newman v. Foster's Heirs, 3 How. 383, 34 Am. Dec. 98; Wallis v. Smith's Heirs, 2 Smedes & M. 220; La Riviere v. La Riviere, 97 Mo. 80, 10 S. W. 840; Schuyler v. Marsh, 37 Barb. 350; Ellicott v. Mosier, 7 N. Y. 201; Brown v. King, 107 N. C. 313, 12 S. E. 137; Doggett v. Hardin, 132 N. C. 690, 44 S. E. 369; Corley v. Pentz, 76 Pa. 57; McIntire v. Wing, 113 Pa. 67, 4 Atl. 197; Grundy v. Hadfield, 16 R. I. 579, 18 Atl. 186; Skinner v. McDaniel, 4 Vt. 418; Smith v. Wingard, 3 Wash. Ter. 291, 13 Pac. 717; Carmichael v. Argard, 52 Wis. 607, 9 N. W. 470; Peters v. Reichenbach, 114 Wis. 209, 90 N. W. 184; Southgate v. Walker, 2 W. Va. 427; Walton v. Wild Goose Mining etc. Co., 123 Fed. 209, 60 C. C. A. 155.

**V. Necessity for the Plaintiff to have been Ousted from His Possession by the Defendant.**

"The possession to be shown in the defendant in an action of ejectment need not be actual as contradistinguished from constructive in its character": Crane v. Ghirardelli, 45 Cal. 235; Kunz v. Evans, 129 Mo. 1, 31 S. W. 114. But it is essential, in order to maintain an action of ejectment, that the plaintiff show that he has been ousted from his possession by the defendant: Watson v. Zimmerman, 6 Cal. 46; Smith v. Burtis, 6 Johns. 197, 5 Am. Dec. 218; Lykens v. Whelan, 15 Pa. 483; Rollins v. Brown, 37 S. C. 345, 16 S. E. 44; Chamberlain v. Donohue, 41 Vt. 306. While, however, ouster is essential to maintenance of the action, it need not be entire or absolute. It is sufficient if defendant is in partial possession of the premises, while plaintiff is in possession of the remainder: Butler v. Frontier Teleph. Co., 186 N. Y. 486, ante, p. 563, 79 N. E. 716. That is, the defendant need not be in the actual possession of the whole piece of land: White v. St. Guirons, Minor, 331, 12 Am. Dec. 56; Colorado Cent. R. Co. v. Smith, 5 Colo. 160; Coleman v. Henderson, 3 Ill. 251. And an abandonment of the possession or occupancy by the defendant after the commencement of the suit will not defeat the action: Archibald v. New York Central etc. R. Co., 1 App. Div. 251, 37 N. Y. Supp. 336; Zeigler v. Fisher's Heirs, 3 Pa. 365.

**VI. What Constitutes an Ouster or Disseisin of the Plaintiff.**

"Actual possession of land consists in subjecting it to the will and dominion of the occupant, and must be evidenced by those things which are essential to its beneficial use": Courtney v. Turner, 12 Nev. 345. In Bath v. Valdez, 70 Cal. 350, 11 Pac. 724, the court said: "Ouster is a wrongful dispossession or exclusion of a party from real property who is entitled to possession. Ouster,

both where the property is owned in severalty and where it is held in divided interests, depends upon the intent of the party taking and holding possession. If a person without title enters into possession of land and subjects it to his will and dominion, claiming and exercising over it the rights of ownership, the inference of his intent to oust the true owner is patent."

And the supreme court of Iowa has also said: "By 'actual ouster' is not meant a physical eviction, but a possession attended with such circumstances as to evince a claim of exclusive right and title and a denial of the right of the other tenants to participate in the profits": *Burns v. Byrne*, 45 Iowa, 285.

The selection of the remedy appropriate to the character of the injury to real property is often a difficult matter to determine, for the reason that it is often difficult to determine whether the hostile acts on the part of the defendant constitute an ouster or a mere trespass. In a general way it may be said that the exercise of acts of ownership and control to the exclusion of plaintiff constitute an ouster: *Gruell v. Spooner*, 71 Cal. 493, 12 Pac. 511; *Redfield v. Utica & S. R. Co.*, 25 Barb. 54. The denial of plaintiff's title under a claim of another title is an ouster: *Dodge v. Page*, 49 Vt. 137. The taking of a conveyance from a hostile source will also constitute an ouster by the tenant: *Clark v. Crego*, 47 Barb. 599. It is a sufficient ouster to maintain ejectment where there is an unlawful interference with the enjoyment of an estate by an unlawful or wrongful entry: *Dyer v. Kruckauer*, 14 Mo. App. 39; *Bradstreet v. Huntington*, 5 Pet. 402, 8 L. ed. 170. A tortious entry is a sufficient ouster: *Smith v. Burtis*, 6 Johns. 197, 5 Am. Dec. 218. But in order to constitute an ouster, it is not necessary that an eviction be accompanied by force: *Corbin v. Cannon*, 31 Miss. 570. Neither is actual damages by the ouster essential where there is a right of possession and a withholding thereof: *Dilley v. Sherman*, 2 Nev. 67. The cultivation of land without a recognition of plaintiff's rights is an ouster: *Hendricks v. Rasson*, 49 Mich. 83, 13 N. W. 367. Likewise, the assertion by the person in possession of title as donee to the exclusion of the heirs is an ouster: *Kellogg v. Gilfillan* (Pa.), 10 Atl. 888. Leasing the property and retaining the rents collected is an ouster: *Durkee v. Felton*, 54 Wis. 405, 11 N. W. 588. But the mere act of the owner of chattels in leaving such chattels upon the land of another is not a sufficient ouster: *Bedell v. Arnold*, 15 App. Div. 576, 44 N. Y. Supp. 541. A peaceable entry under circumstances equivalent to forcible entry is an ouster: *Tidwell v. Chiricahan Cattle Co.*, 5 Ariz. 352, 53 Pac. 192; *Chapman v. Gray*, 15 Mass. 439; *McCann v. Rathbone*, 8 B. I. 297. A mere claim of an easement is not a sufficient disseisin: *Child v. Chappell*, 9 N. Y. 246. But a notice not to trespass, in connection with other acts of defendant, may constitute an ouster, since the notice gives a construction to acts which otherwise may have

amounted to mere acts of trespass: *Dikeman v. Taylor*, 24 Conn. 219. And the mere fact that defendant was ignorant of the boundary line and that his intrusion was the result of his mistake or inadvertence does not relieve his intrusion from being an ouster: *Hamilton v. Murray*, 29 Mont. 80, 74 Pac. 75. The refusal of a contractor to allow the owner of a building, which the contractor has under course of construction for such owner, to enter the building for the purpose of inspecting it, is a sufficient ouster to form the basis of an action of ejectment against the contractor: *Smith v. Revels*, 79 Hun, 213, 29 N. Y. Supp. 658. The mere act of cutting timber on land and hauling it off is not such a possession of land as will entitle the owner to maintain ejectment against the trespasser: *Washburn v. Cutter*, 17 Minn. (Gil.) 335; *Thompson v. Burhans*, 79 N. Y. 93; *Austin v. Holt*, 32 Wis. 478; *Ozark Land Co. v. Leonard*, 20 Fed. 881. But occasional entries and acts of trespass on land, when accompanied by claims of right and refusal to surrender possession, constitute an ouster: *Roach v. Heffernan*, 65 Vt. 485, 27 Atl. 71. A public use of property without having preceded such public use by the proper proceedings for its condemnation for such purposes is a sufficient disseisin or ouster to maintain ejectment: *Armstrong v. St. Louis*, 69 Mo. 309, 33 Am. Rep. 499; *McCarty v. Clark County*, 101 Mo. 179, 14 S. W. 51; *Cowenhoven v. Brooklyn*, 38 Barb. 9; *Strong v. Brooklyn*, 68 N. Y. 1; *Lawe v. Kaukauna*, 70 Wis. 306, 35 N. W. 561. As to what circumstances constitute an ouster as between cotenants, see monographic note to *Marshall v. Palmer*, 50 Am. St. Rep. 843, 844.

#### VII. For What Property Ejectment is Maintainable.

**a. In General.**—At the common law ejectment did not lie for those things that could be neither felt nor seen: *Aiken v. Benedict*, 39 Barb. 400. The general doctrine of the common law on the subject, as administered in the United States, was set forth by the court in *Rowan v. Kelsey*, 18 Barb. 484, in the following language: "The action of ejectment will lie whenever a right of entry exists, and the interest is of such a character that it can be held and enjoyed, and possession thereof delivered in execution of a judgment for its recovery. Ejectment is only maintainable for corporeal hereditaments. 'A writ of ejectment is not an adequate means to try the title of all estates, for on those things whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the parties. Therefore, an ejectment will not lie of an advowson, a rent, a common or other incorporeal hereditament, except for titles in the hands of lay appropriators, by the express purview of statute 32 Henry VIII, chapter 7' (3 Blackstone's Commentaries, 2063). 'A writ of *ejectione firmæ*, or action of trespass and ejectment, was the appropriate form of action when the lessor, reversioner, remainderman or any stranger doth eject or oust the lessee of his term'



(3 Blackstone's Commentaries, 199). Things that lie merely in grant are not the subjects of an action of ejectment, 'because these being incorporeal things are in their nature invisible quae nequo tangi nec videri possunt; and, therefore, not capable of being delivered in execution' (Bacon's Abridgment, Ejectment, D). 'An ejectment lies of a stable, because it is a word of determinate signification, and may be delivered by a writ of execution.' 'An ejectment of a house is good, though in a praecipe it ought to be demanded by the name of the message. So ejectment of a chamber in the second story of such a house was held good, there being certainty enough to direct the sheriff in the execution.' (Bacon's Abridgment, Ejectment, D. See, also, Jackson v. Buel, 9 John. 298; Jackson v. May, 16 John. 184.) The true test, therefore, of this action seems to be, that the thing claimed should be a corporeal hereditament, that a right of entry should exist at the time of the commencement of the action, and that the interest be visible and tangible, so that the sheriff may deliver the possession to the plaintiff in execution of the judgment of the court."

One of the essentials necessary to make property subject to ejectment is that the interest sought to be recovered by the action be visible and tangible: Southern Pacific Co. v. Burr, 86 Cal. 279, 34 Pac. 1032; Nichols v. Lewis, 15 Conn. 137; Winona v. Huff, 11 Minn. 119; Aiken v. Benedict, 39 Barb. 400. And another general rule announced by the courts is that ejectment will not lie for anything for which no entry can be made or which the sheriff cannot deliver possession on execution: Tennessee etc. R. Co. v. East Alabama Ry. Co., 75 Ala. 516, 51 Am. Rep. 475; Beatty v. Gregory, 17 Iowa, 109, 85 Am. Dec. 546; Farley v. Craig, 15 N. J. L. 191; Child v. Chappell, 9 N. Y. 246; Hancock v. McAvoy, 151 Pa. 460, 31 Am. St. Rep. 774, 25 Atl. 47, 18 L. R. A. 781.

The real point of importance decided by the principal case was that, notwithstanding the technical rules in regard to the necessity for the sheriff to be able to place the plaintiff in ejectment in possession of the property sued for, the space above land is real estate capable of possession in the same manner as the land itself: Butler v. Frontier Teleph. Co., 186 N. Y. 486, ante, p. 563, 79 N. E. 716.

Although it is one of the general rules governing the maintenance of actions of ejectment that the object sued for be a corporeal hereditament as before stated (Mahon v. San Rafael Turnpike Co., 49 Cal. 269; Ezzard v. Findley Gold Min. Co., 74 Ga. 520, 58 Am. Rep. 445; Lee v. Harris, 206 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230; Beatty v. Gregory, 17 Iowa, 109, 85 Am. Dec. 546; Taylor v. Gladwin, 40 Mich. 232; Farley v. Craig, 15 N. J. L. 191; Childs v. Chappell, 9 N. Y. 246; Dark v. Johnson, 55 Pa. 164, 93 Am. Dec. 732; Fritache v. Fritache, 77 Wis. 270, 45 N. W. 1089), still where the property sued for is capable of physical delivery, it is no objection that it

may be an incorporeal hereditament: *Reynolds v. Cook*, 83 Va. 817, 5 Am. St. Rep. 317, 3 S. E. 710; *Integral Min. Co. v. Altoona Min. Co.*, 75 Fed. 379, 21 C. C. A. 409.

**b. Maintainability for an Incorporeal Hereditament, Easement, Servitude or Mere License or Right of Use.**—The general rule is that ejectment does not lie for the recovery of an incorporeal hereditament: *Louisville etc. R. Co. v. Massey*, 136 Ala. 156, 96 Am. St. Rep. 17, 33 South. 896; *Wood v. Truckee Turnpike Co.*, 24 Cal. 474; *Swift v. Goodrich*, 70 Cal. 103, 11 Pac. 561; *Beatty v. Gregory*, 17 Iowa, 109, 85 Am. Dec. 546; *Taylor v. Gladwin*, 40 Mich. 232; *Winona v. Huff*, 11 Minn. 119; *Farley v. Craig*, 15 N. J. L. 191; *Wilklow v. Lane*, 37 Barb. 244; *Jackson v. May*, 16 Johns, 184; *Child v. Chappell*, 9 N. Y. 246; *Parker v. West Coast Packing Co.*, 17 Or. 510, 21 Pac. 822, 5 L. R. A. 61; *Black's Lessee v. Hepburne*, 2 Yeates, 331; *Union Canal Co. v. Young*, 1 Whart. 410, 30 Am. Dec. 212; *Hancock v. McAvoy*, 151 Pa. 460, 31 Am. St. Rep. 774, 25 Atl. 47, 18 L. R. A. 781: Hence, ejectment will not lie for an easement or servitude: *Tennessee etc. R. Co. v. East Alabama R. Co.*, 75 Ala. 516, 51 Am. Rep. 475; *Louisville etc. R. Co. v. Massey*, 136 Ala. 156, 96 Am. St. Rep. 17, 33 South. 896; *Wood v. Truckee Turnpike Co.*, 24 Cal. 474; *San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 542; *Southern Pac. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032; *Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230; *Taylor v. Gladwin*, 40 Mich. 232; *Winona v. Huff*, 11 Minn. 119; *Lott v. Payne*, 82 Minn. 218, 100 Am. St. Rep. 632, 33 South. 948; *Child v. Chappell*, 9 N. Y. 246; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760; *Hancock v. McAvoy*, 151 Pa. 460, 31 Am. St. Rep. 774, 25 Atl. 47, 18 L. R. A. 781; *Racine v. Crottsenberg*, 61 Wis. 481, 50 Am. Rep. 149, 21 N. W. 520; and it has also been declared that ejectment is not the proper remedy to recover a franchise, such as, for instance, a ferry franchise: *Rees v. Lawless*, Litt. Sel. Cas. 184, 12 Am. Dec. 295; *Mayor etc. v. Union Ferry Co.*, 55 How. Pr. 138. Ejectment will not lie for a mere license or right of use or privilege: *Jackson v. May*, 16 Johns. 194; *Black's Lessee v. Hepburne*, 2 Yeates, 331; *Richardson v. Louisville etc. R. Co.*, 169 U. S. 128, 18 Sup. Ct. Rep. 268, 42 L. ed. 687.

**c. Maintainability for Chattels or Fixtures.**—Although the action of ejectment has been shorn of the many technicalities which formerly surrounded it, it has remained essentially a real action as distinguished from a personal action, and accordingly it is not the proper action for the recovery of chattels.

Ejectment will, however, lie for the recovery of a fixture since it is an interest in the land: *Stancel v. Calvert*, 60 N. C. 104; *Hill v. Hill*, 43 Pa. 521.

**d. Maintainability for Parts of a Building.**—“There may be within the same territorial limits, distinct estates of inheritance. The different stories of the same dwelling may be held in fee by

different owners. The title to the surface of the soil may be in one person, the title to the mines, or different strata under the surface, may be in others": *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. 322. Different horizontal strata of land may be owned by different persons: *Casselman v. Packard*, 16 Wis. 114, 82 Am. Dec. 710. Hence, it is competent for the owner of land to contract with another person that such person may be the owner of a building to be erected on the land: *Smith v. Benson*, 1 Hill, 176; *People v. Board of Assessors*, 93 N. Y. 308.

In *Gilliam v. Bird*, 8 Ired. 280, 49 Am. Dec. 379, the court, in holding that ejectment would lie for the recovery of a house apart from the soil on which it stands, said: "The ownership of land is not confined to its surface, but extends indefinitely, downward and upward. *Cujus est solum, ejus est usque ad coelum*: 2 Blackstone's Commentaries, 18. It includes not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees and herbage, or by the hand of man, as houses and other buildings: *Coke's Littleton*, 4a. A house or even the upper chamber of a house may be held separately from the soil on which it stands, and an action of ejectment will lie to recover it: 3 Kent's Commentaries, 401, note e."

So, also, in a later case in that same state it was held that ejectment would lie to recover the upper story of a building, the said upper story having been conveyed to the plaintiff: *Asheville Division etc. v. Aston*, 92 N. C. 578.

It has been held that ejectment will lie for a "passage-room": *Bindover v. Sindercombe*, 2 Ld. Raym. 1470; or for a part of a house designated by a particular name: *Sullivan v. Seagrave*, 2 Strange, 695; *Rawson v. Maynard*, Cro. Eliz. 286; or for a vestry: *Hutchinson v. Puller*, 3 Lev. 96. But ejectment will not lie for a room or a portion of a building if the building is so destroyed as to lose its identity and the possession thereof thus be incapable of delivery by the sheriff upon a writ of habeas facias: *Rowan v. Kelsey*, 18 Barb. 484. In a case in Ohio the court in holding that ejectment would lie on behalf of the landlord against his tenant who, having had a lease for the cellar and a certain room over it, after the destruction of the building by fire, constructed over the cellar a small house which occupied the same space as the room leased by him, observed: "The owner of the land can convey it, or the profits of it, for such terms and in such parcels as he thinks proper. He can grant the right to take all the minerals underneath, or those twenty feet below the surface only; to dig all the turf; to inhabit a cave, if there is one; to occupy a room on the third story; to occupy the second story, a room in the first story, or the cellar, or a part of the cellar. By such grants the land does not pass. When the mineral or the turf is exhausted, the grantee has no right even to enter the premises. When the cave is destroyed by a convulsion or other-

wise, there is nothing that was granted remaining. It is so of the rooms or cellar of a house. The lessees of a middle story of a house are limited above and below as well as on the sides; yet the land is as necessary to sustain their part of the house as that below. Where the whole of the profits of a piece of land are granted to an individual the land passes. Such a grant manifests such an intention. When the profits are gone why retain the land? But when a part only of the profits are granted, the land does not in general pass, although livery is made: *Coke's Littleton*, 4, 6. By the grant of a whole house to an individual, unless there are productive minerals underneath, the whole profits of the land on which it stands are granted, and the land passes. By the granting of the cellar the whole profits of the land underneath are not parted with, nor by the granting of any one or two rooms when they are overhung by others. It is said by 2 *Blackstone*, 19, that by the term 'land' anything terrestrial may pass, but by any other term nothing else passes but what falls with the strictest propriety within the meaning of the term used."

The decision of the court in *Kerr v. Merchants' Exchange Co.*, 3 *Edw. Ch.* 315, though not an ejectment suit, also bears on the right of a tenant, who had a lease to certain rooms in a business building, to reoccupy similar rooms in a building reconstructed on the site of the old building.

The right to recover by ejectment, or other similar proceedings, part of a building depends to a large extent upon whether the interest is a freehold interest or mere easement. Thus, under an agreement that one may construct a second story on another building and "have and own said second story" for his use perpetually, no right exists to recover the building as a part of the land, since under the agreement a mere right to use is granted and no proprietary interest in the corpus of the land: *Thorn v. Wilson*, 110 *Ind.* 325, 59 *Am. Rep.* 209, 11 *N. E.* 230.

**e. Maintainability for Accretions, Made Lands, Tide Lands or Lands Under Water.**—Ordinarily, accretions become a part and parcel of the land against which they are formed, and naturally become recoverable in ejectment proceedings in the same manner as the land to which they are formed would be: *Cobb v. Lavalley*, 89 *Ill.* 331, 31 *Am. Rep.* 91; *Bates v. Illinois Cent. R. Co.*, 1 *Black*, 204, 17 *L. ed.* 258. Ejectment is not maintainable to recover the bed of a lake, even though the plaintiff establishes ownership of the natural shore. The title to land under lakes and ponds held by the state does not change by reason of the fact that such lakes or ponds are artificially filled so as to raise the land above the surface of the water: *Illinois Steel Co. v. Bilot*, 109 *Wis.* 418, 83 *Am. St. Rep.* 905, 84 *N. W.* 855, 85 *N. W.* 402. The question whether a recovery is allowable in such cases is really a question of title. Thus, in *Vermont* it was held that ejectment would not lie to recover land

made by a stranger filling earth in front of lands bordering on Lake Champlain because the riparian owner had no title to the soil below low-water mark: *Austin v. Rutland R. Co.*, 45 Vt. 215.

Ejectment is maintainable for lands under water: *E. G. Blackslee Mfg. Co. v. E. G. Blackslee's Son's Ironworks*, 129 N. Y. 155, 29 N. E. 2; *Lowndes v. Huntington*, 153 U. S. 1, 14 Sup. Ct. Rep. 758, 38 L. ed. 615. But in order for ejectment to lie, the lands must not be below low-water mark: *Nichols v. Lewis*, 15 Conn. 137; *Stockham v. Browning*, 18 N. J. Eq. 390; *Parker v. West Coast Packing Co.*, 17 Or. 510, 21 Pac. 822, 5 L. R. A. 61. So, also, ejectment is maintainable for tide lands subject to such rights of navigation which the public have therein: *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143, 30 South. 645, 64 L. R. A. 333; *Champlain etc. Co. v. Valentine*, 19 Barb. 484; *People v. Mauran*, 5 Denio, 389; *New York v. New York etc. R. Co.*, 69 Hun, 324, 23 N. Y. Supp. 562; *Carroll v. Price*, 81 Fed. 137.

f. **Maintainability for Mining Rights.**—The distinction observed by the courts with respect to the maintainability of ejectment to recover rights pertaining to mines or minerals has been whether the plaintiff had ever entered into the possession of his rights and expended labor or money in connection with such rights. Where the plaintiff has so entered into the possession of such mining rights, he may maintain ejectment for their recovery: *Beatty v. Gregory*, 17 Iowa, 109, 85 Am. Dec. 546; *Kirk v. Mattier*, 140 Mo. 23, 41 S. W. 252; *Karns v. Tanner*, 66 Pa. 297. But until he has entered into such a possession, the courts are prone to withhold the right to maintain ejectment: *Harlow v. Lake Superior Iron Co.*, 36 Mich. 105; *Petroleum Co. v. Coal etc. Co.*, 89 Tenn. 381, 18 S. W. 65.

Thus, ejectment does not lie for an exclusive right to bore for oil, even though the right to the oil is given to the oil as a chattel if found: *Dark v. Johnston*, 55 Pa. 164, 93 Am. Dec. 732; *Union Petroleum Co. v. Bliven P. Co.*, 72 Pa. 173. A person holding the exclusive privilege to prospect and mine for oil, the grantor to receive part of the oil mined, cannot maintain ejectment against the grantor if he has never been in possession, since the right is a mere license: *Kelly v. Keys*, 213 Pa. 295, 62 Atl. 911. But a grant of a right to quarry and remove limestone from land for a specific purpose is sufficient under the Virginia code to support an action in ejectment: *Reynolds v. Cook*, 83 Va. 817, 5 Am. St. Rep. 317, 3 S. E. 710. Under the peculiar rights given to the discoverer of minerals upon state lands in New York by the laws of that state, the person who obtains the consent from the commissioners of the land office to work the mine acquires no estate in the lands but a mere right or incorporeal privilege to take out the mineral and retain only what is so taken out, and hence his grantee cannot maintain ejectment against a person in possession of such lands: *Moore v. Brown*, 139 N. Y. 127, 34 N. E. 772.

In refusing to allow ejectment to recover mining interests which were reserved in the deed to the defendant on the ground that under such a reservation the possession of the surface did not show an adverse possession of the mineral rights, the court in *Louisville etc. R. Co. v. Massey*, 136 Ala. 156, 96 Am. St. Rep. 17, 33 South. 896, said: "The interest which plaintiff sought to recover was the mineral deposits in and upon the soil. We find no evidence in the record of any adverse possession of this interest by the defendant. To the contrary, it is shown, without controversy, that the defendant held and claimed under the contract between him and the Alabama and Chattanooga Railroad Company, which expressly reserved the mineral interest. It is true that the defendant testified that he at one time told the agent of the company that he repudiated this contract, but it none the less clearly and without conflict appears that he all along held under this writing, and claimed only that interest in the land which the company undertook therein to convey to him, having subsequent to the time of his alleged repudiation of this contract made a payment under it, had it recorded, continued to hold it, and set it forth in the abstract tendered by him in the trial of this case. The question involved is not one of severance, *vel non*, of the general and the mineral interest in land by a conveyance, but whether he claimed the mineral interest while in possession of the land, for without such claim his possession of the surface would not be adverse possession of the minerals, or, more accurately, his possession of the land, being under a claim which did not embrace the minerals, was not adverse to the true owners, as to the minerals."

So, also, the grantees in a deed reserving mining rights below the surface but providing that in the event that the surface be permanently occupied by the owner of the reserved mining rights he should compensate the surface owner of the fee, cannot maintain ejectment for ground reasonably necessary to the owner of the mining rights for the removal of the ore, since the use of such ground is in the nature of an easement which is appurtenant to the mine: *Erickson v. Michigan Land etc. Co.*, 50 Mich. 604, 16 N. W. 161.

**g. Maintainability for Cemeteries or Burial Lots Therein.**—As a general rule, a deed to a cemetery lot is merely a grant of a right to make interments in the lot exclusive of others as long as the ground continues to be used for the burial purposes. Hence, it is held that under such circumstances the right of sepulture is not sufficient to maintain an action of ejectment: *Stewart v. Garrett*, 119 Ga. 386, 100 Am. St. Rep. 179, 46 S. E. 427, 64 L. R. A. 99; *Hancock v. McAvoy*, 151 Pa. 460, 31 Am. St. Rep. 774, 25 Atl. 47, 18 L. R. A. 781; *Gardner v. Swan Point Cemetery*, 20 R. I. 646, 78 Am. St. Rep. 897. The supreme court of Mississippi has, however, held that ejectment will lie for a burial lot where the plaintiff, under a parol grant, entered into full possession of the lot in the free part of the ceme-

tery and no money consideration was paid therefor. The suit seems to have been based on the theory that the defendants were trespassers, and that "against a trespasser anterior possession alone is sufficient to maintain ejectment": *Wilkinson v. Strickland* (Miss.), 35 South. 177.

**h. Maintainability for Wharves or Piers.**—The right to maintain ejectment for the recovery of wharves and piers has been allowed in cases not only where the state was plaintiff, but also in cases where the riparian owner was the plaintiff: *People v. Davidson*, 30 Cal. 379; *Coburn v. Ames*, 52 Cal. 385, 28 Am. Rep. 634; *Nichols v. Lewis*, 15 Conn. 137; *Mayor etc. of New York v. Law*, 125 N. Y. 380, 26 N. E. 471. But the right to maintain ejectment for a wharf has been denied in Oregon on the ground that the right to construct such wharf is a mere incorporeal hereditament: *Parker v. West Coast Packing Co.*, 17 Or. 510, 5 L. R. A. 61, 21 Pac. 822, 5 L. R. A. 61. And in Washington the right to maintain ejectment was denied to a riparian owner because, under the constitution of that state, the title and disposal of land below high-tide mark is reserved to the state, and in the case at bar the plaintiff had not connected himself with the title of the state: *Pierce v. Kennedy*, 2 Wash. 324, 26 Pac. 554, 28 Pac. 35.

**i. Maintainability for a Right of Way, Street or for Vaults Underneath a Street.**—The general rule is that ejectment will not lie for the recovery of a mere right of way, since it is generally considered as a mere easement: *Wood v. Truckee Turnpike Co.*, 24 Cal. 474; *Taylor v. Gladwin*, 40 Mich. 232; *Smith v. Wiggin*, 48 N. H. 105; *Northern Turnpike Road Co. v. Smith*, 15 Barb. 355; *Judd v. Leonard*, 1 D. Chip. 204; *Buckner v. Hutchings*, 83 Wis. 299, 53 N. W. 505. An exception to the general rule is made in the case of rights of way for railroads. The rule in such cases appears to be that ejectment is maintainable for interference with the possession of such rights of way: *Tennessee etc. R. Co. v. East Alabama etc. R. Co.*, 75 Ala. 516, 51 Am. Rep. 475; *Graham v. St. Louis etc. R. Co.*, 69 Ark. 562, 65 S. W. 1048, 66 S. W. 344; *Southern Pac. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032; *Carolina Central R. Co. v. McCaskill*, 94 N. C. 746; *Rutland R. Co. v. Chaffee*, 71 Vt. 84, 42 Atl. 984, 48 Atl. 699. There are decisions holding that where the railroad company has constructed its track upon the land without having first acquired a right of way, that the owner of the land so appropriated may recover the land in ejectment: *Terre Haute etc. R. Co. v. Rodel*, 89 Ind. 128, 46 Am. Rep. 164; *Daniels v. Chicago etc. R. Co.*, 35 Iowa, 129, 14 Am. Rep. 490; *Illinois Cent. R. Co. v. Hoskins*, 80 Miss. 730, 92 Am. St. Rep. 612, 32 South. 150. In other cases a distinction is made where the land owner acquiesces in the building of the railroad across his land. In such cases he is estopped from recovering the land by ejectment, and he is, under such circumstances, restricted

to his action to recover compensation for the land so taken in case the company refuses to compensate him for it: *Hendrix v. Southern Ry. Co.*, 130 Ala. 205, 89 Am. St. Rep. 27, 30 South. 596.

Where the fee of the land used as a public street is in the municipality, ejectment may, of course, be maintained by the municipality to recover possession of the street: *Chester v. Wabash etc. R. Co.*, 182 Ill. 382, 55 N. E. 524; *City of California v. Howard*, 78 Mo. 88. "The right of a city or village which possesses the fee to the streets and alleys to maintain an action of ejectment against one who has entered upon or occupied any portion of a street or alley seems never to have been doubted, but where the fee remained in the proprietor of the abutting property, that fact was thought to present a technical objection to the successful prosecution of the action. The right to the possession, use and control of all highways, including streets and alleys, rests primarily in the state in its sovereign capacity, and the state having, by the express grants set forth in various subdivisions of section 1 of article 5, chapter 124, entitled 'Cities,' etc. (1 Starr & Curtis' Annotated Statutes of 1896, p. 689), vested in the cities and villages of the state the possession, use and control of their respective streets and alleys, the right of possession, use and control is regarded by the courts as a legal and not a mere equitable right, and in that view no cause or reason exists why the action of ejectment may not be maintained, though the city or village has not the legal title to the street or alley: *City of Chicago v. Wright*, 69 Ill. 318; 10 Am. & Eng. Ency. of Law, 2d ed., 475; *Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 13; *Klinkener v. McKeesport*, 11 Pa. 444. A city or village may, therefore, resort to the action of ejectment to regain possession of any part of a street or alley which may be unlawfully withheld from it": *Village of Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230.

The authorities, however, are divided upon the question whether ejectment will lie on behalf of the municipality for the possession of a street the fee of which does not reside in the municipality. Perhaps the preponderance of authority is to the effect that the municipality may maintain ejectment under such circumstances: *San Francisco v. Sullivan*, 50 Cal. 603; *Visalia v. Jacob*, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433; *Chicago v. Wright*, 69 Ill. 318; *Village of Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230; *Augusta v. Perkins*, 3 B. Mon. 437; *Chambersburg v. Manko*, 39 N. J. L. 496. Contra, *Grand Rapids v. Whittlesey*, 33 Mich. 109; *Racine v. Crotsenberg*, 61 Wis. 481, 50 Am. Rep. 149, 21 N. W. 529; *Bay County v. Bradley*, 39 Mich. 163, 83 Am. Rep. 367.

And where a vault underneath the street had been made under a grant of permission by the municipality which owned the fee of the street, it was held that it was as much a part of the land as if it had been a room in the building, and that the right to its possession



was not a mere easement, and hence, that an action for its possession was maintainable: *Coster v. Peters*, 5 Rob. 192.

#### VIII. For What Invasion of Possession Ejectment is Maintainable.

a. **The General Rule.**—The question for what invasions of the right of possession ejectment will lie is perhaps the most difficult one with relation to the maintainability of such suits. The real question to be determined in such cases is whether the invasion complained of amounts to a sufficient ouster of the plaintiff to sustain ejectment. The general principles applicable to the question of ouster were discussed in subdivision VII. The rule applicable to invasions which affect the property rights of the plaintiff, both in respect to the extension of his land in the air and toward the center of the earth, was made clear in the principal case, in that portion of the opinion wherein the court observed: "What is 'real property'? What does the term include so far as the action of ejectment is concerned? The answer to these questions is found in the ancient principle of law: '*Cujus est solum, ejus est usque ad coelum et ad infernos.*' The surface of the ground is a guide, but not the full measure; for within reasonable limitations land includes not only the surface but also the space above and the part beneath: Coke's *Littleton*, 4a; Blackstone's *Commentaries*, 18; 3 Kent's *Commentaries*, 14th ed., \*401. '*Usque ad coelum*' is the upper boundary, and while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man. So far as the case before us is concerned, the plaintiff, as the owner of the soil, owned upward to an indefinite extent. He owned the space occupied by the wire, and had the right to the exclusive possession of that space which was not personal property, but a part of his land. According to fundamental principles and within the limitation mentioned, space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly. If the wire had touched the surface of the land in permanent and exclusive occupation, it is conceded that the plaintiff would have been dispossessed *pro tanto*. A part of his premises would not have been in his possession, but in the possession of another. The extent of the disseisin, however, does not control; for an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath"; *Butler v. Frontier Teleph. Co.*, 186 N. Y. 486, ante, p. 563, 79 N. E. 716.

Though we are not aware of any decision construing the meaning of "*ad infernos*," as used in the maxim "*Cujus est solum, ejus est usque ad coelum et ad infernos*," and though it may be doubtful whether the court will take judicial notice of its exact location, still we apprehend that in accordance with the principles announced in the principal case in defining what is meant by the term "*ad*

coelum," the only limitation to the right of possession of the fee owner toward the center of the earth will be the salamander qualities of man to withstand the heat encountered in the subterranean portions of his property.

b. **Maintainability for Projecting Eaves, Cornices, Roofs or Overhanging Trees.**—The maintainability of ejectment for the invasion of property rights by projecting eaves, roofs or other parts of buildings has, in the few cases which have arisen over such controversies, not been definitely settled, unless it can be said that the principal case has settled the principles of law applicable to such intrusions. It is generally contended in such cases that the proper remedy is for trespass or for nuisance. In the case of projections it is sometimes urged that they do not interfere with the use of the property over which they project, but this argument loses its force in the face of the maxim, "*Cujus est solum, ejus est usque ad coelum et ad infernos.*" So it resolves itself into the question whether the land owner should be compelled to part with property or any portion of it, by reason of the taking of the same without due process of law, upon the mere payment of damages in a suit for trespass. If the intrusion be one of a temporary character, the argument that a suit for the abatement of the nuisance is an adequate remedy has considerable force. It is, perhaps, true that in some cases the intrusions are of such an insignificant character that the allowance of ejectment seems harsh, but in many other instances intrusions which are apparently slight may, nevertheless, be of such great inconvenience and of such an irreparable character that neither a suit for trespass nor an action for nuisance would be an adequate remedy.

Though the issue in the principal case (*Butler v. Frontier Tel. Co.*, 186 N. Y. 486, ante, p. 563, 79 N. E. 716) was whether ejectment would lie for the intrusion of telephone wires, it undoubtedly follows from the rule announced in that case that the same rule would now be applied in that state to projecting eaves, cornices and the like. The earlier decisions on the subject were not harmonious. In *Aiken v. Benedict*, 39 Barb. 400, and *Vrooman v. Jackson*, 6 Hun, 326, it was held that ejectment was not maintainable, while the contrary had been held in *Sherry v. Frecking*, 4 Duer, 452. The question was alluded to but not decided in *Leprell v. Kleinschmidt*, 112 N. Y. 364, 19 N. E. 812. The New York cases referred to have been cited in perhaps every other decision bearing on the subject. Ejectment was allowed in Vermont for an intrusion caused by a projecting roof: *Murphy v. Bolger*, 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309. And ejectment has been recently allowed in Minnesota in a case of projecting ornamental moldings: *Johnson v. Minnesota Tribune Co.*, 91 Minn. 476, 98 N. W. 321. But in Massachusetts it has been held that an overhanging cornice is not a sufficient disseisin to sustain ejectment: *Randall v. Sanderson*, 111 Mass. 114. Although ejectment was allowed in Wisconsin for an intrusion caused by projecting

stones of a foundation wall (*McCourt v. Eckstein*, 22 Wis. 153, 94 Am. Dec. 594), it was disallowed in a later case for projecting eaves where both the adjoining owners had constructed their buildings up to the boundary line: *Rasch v. Noth*, 99 Wis. 285, 67 Am. Rep. 858, 74 N. W. 820, 40 L. B. A. 577. In *Norwalk etc. Lighting Co. v. Vernam*, 75 Conn. 662, 96 Am. St. Rep. 246, 55 Atl. 168, the court, in holding that the projection of a structure over the land of another, but not touching it, though an invasion of that other's rights was not an ouster of possession, said: "The possession of the adjoining proprietor remains unaffected, except that it is rendered less beneficial. The possession and occupancy of the projecting structure has no effect on the ownership of the soil beneath, unless it be maintained under a claim of right for fifteen years, and so should ripen into a perpetual easement. It follows that equitable relief was properly claimed and granted. While the plaintiff might have itself removed the nuisance, without appealing to the courts, it was not restricted to reliance upon self-help. Nor had it only a right of action for damages. An injunction might originally have been brought by the plaintiff's grantor to prevent the construction of the projection. This not having been done, the plaintiff could ask for a mandatory injunction to prevent its wrongful continuance."

We have not observed any case in which ejectment was allowed for the invasion caused by overhanging trees or branches. In fact, in the cases upon that subject the remedy has been declared to be a suit for the abatement of the nuisance or a summary abatement by clipping off the overhanging parts of the tree: *Grandona v. Lovedal*, 70 Cal. 161, 11 Pac. 623.

**c. Maintainability for Overflowing of Lands by Means of Dams.** Damming water back from plaintiff's land is not such an ouster of his possession as will support an action for ejectment. As was said by the court: "The only effect of the dam was that the water stood in the channel of the creek on plaintiff's land, within the banks of the creek, at a greater depth than before the dam was built. Neither the water nor the land was in the possession of the defendant, and it neither had nor claimed any right to the same. If the writ of possession provided by the statute in case of a recovery in ejectment should be issued, it would be impossible for the sheriff to deliver possession by reducing the water in the channel to its former level. The land and water were already in the possession of the plaintiff. It is plain that there could be no remedy by ejectment": *Burke v. Carlinville Water Co.*, 176 Ill. 555, 52 N. E. 266. The intimidation of the court was to the same effect in *Ezzard v. Findley Gold M. Co.*, 74 Ga. 520, 58 Am. Rep. 445.

A distinction has, however, been raised by the supreme court of Minnesota to the effect that ejectment was maintainable for land overflowed by a dam in a river adjacent to the overflowed land where the defendant claimed a perpetual right to cause such an

overflow. The court in that case observed: "The only question presented is whether ejectment is plaintiff's proper remedy. It is insisted by defendants that, as the alleged invasion of plaintiff's proprietary rights consists in overflowing the lands in question, his only remedy is an action for damages; that if he should recover in this form of action, the judgment would be ineffectual, because of the inability of the sheriff under a writ of restitution to give possession to plaintiff. As we view the subject, the right to maintain the action must be upheld. The case comes within the rule of *Johnson v. Minnesota Tribune Co.*, 91 Minn. 476, 98 N. W. 321. Whatever may be the state of the authorities elsewhere, the decision there made controls, on principle, the case at bar. That was an action in ejectment, and it appears that a cornice in defendant's building projected across the line between his lot and that of plaintiff. It was insisted that ejectment would not lie, for substantially the same reason urged in the case at bar, namely, that the judgment would be ineffectual—incapable of enforcement by the sheriff; but we sustained the right of action. In this case it clearly appears from the pleadings and evidence that defendants claim the right perpetually to maintain the dam in question, which, if sustained, vests in them an interest in the land, a permanent easement, and there can be no logical reason why this asserted right may not be adjudicated in this form of action: *Nichols v. Lewis*, 15 Conn. 137; *Champlain etc. R. Co. v. Valentine*, 19 Barb. 484; *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149; *Murphy v. Bolger*, 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309; *Tyler on Ejectment*, 741. It is true the sheriff might find it impossible to deliver actual physical possession upon a writ of restitution; but that difficulty is no reason why the action of ejectment may not be maintained to determine the legal rights of the parties. The case would be different if the acts complained of were casual or transitory, and not under an asserted right of permanent enjoyment. In such a case, the remedy would be in trespass; but here the title to the property is involved, and we have no difficulty in holding that the legal rights of the parties may be determined in this form of action. It is a preparatory step, and will enable plaintiff, if he recovers judgment, to resort to other appropriate remedies to enforce his rights: 3 *Pomeroy on Equity*, 1372. If possession cannot be delivered by the sheriff, and defendants refuse to abandon the dam after an adjudication against them in this action, the dam would become a nuisance, and could be abated in another action": *Reynolds v. Munch*, 100 Minn. 314, 110 N. W. 368.

**d. Maintainability for Intrusions by the Stringing of Wires Over Private Land.**—It was decided by the principal case that ejectment will lie where a telephone wire is stretched across plaintiff's premises about thirty feet above the surface of the ground, even though it is not supported by any structure standing on the premises, since the

owner of the land is entitled to its exclusive possession: *Butler v. Frontier Teleph. Co.*, 186 N. Y. 486, ante, p. 563, 79 N. E. 716.

**e. Maintainability for Intrusions or Encroachments on Public Highways or Streets.**

1. **In General.**—The owner of the fee of land subject to the easement of a public highway may, as a general rule, maintain ejectment against an intruder who takes possession of the highway and uses it for purposes other than a highway; but his recovery is subject to the public easement: *Taylor v. Armstrong*, 24 Ark. 102; *Coburn v. Ames*, 52 Cal. 385, 28 Am. Rep. 634; *Woodruff v. Neal*, 28 Conn. 165; *Savannah v. Steamboat Co.*, R. M. Charl. 342; *Thomas v. Hunt*, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857; *Ocean Grove etc. Assn. v. Berthall*, 63 N. J. L. 312, 43 Atl. 887; *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272; *Strong v. Brooklyn*, 68 N. Y. 1; *Phillips v. Dunkirk etc. R. Co.*, 78 Pa. 177; *Pomeroy v. Mills*, 3 Vt. 279, 23 Am. Dec. 207; *Weisbrod v. Chicago etc. Ry. Co.*, 21 Wis. 602. But ejectment will not lie for a street unless the occupation complained of is wholly inconsistent with the public easement: *Adams v. Saratoga etc. R. Co.*, 11 Barb. 414. The encroachment must be caused by a permanent obstruction of the surface of the street: *Thomas v. Hunt*, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857.

It must, however, be remembered that the right to maintain ejectment with respect to recovering the possession of streets and highways is not a settled question: See subdivision VII, i.

2. **By Quasi Public or "Public Service" Corporations, Such as Railroads, Telegraph Companies and the Like.**—Where the alleged intrusion upon the highway or street is made by a quasi public or "public service" corporation, by virtue of a municipal or legislative license, ejectment will not ordinarily lie where the intrusion does not exceed the privileges granted in the license: *Montgomery v. Santa Ana etc. R. Co.*, 104 Cal. 186, 43 Am. St. Rep. 89, 37 Pac. 786, 25 L. R. A. 654; *Edwardsville etc. R. Co. v. Sawyer*, 92 Ill. 377; *Gans etc. Mfg. Co. v. St. Louis etc. Ry. Co.*, 113 Mo. 308, 35 Am. St. Rep. 706, 20 S. W. 658, 18 L. R. A. 339; *Paquet v. Mt. Tabor St. Ry. Co.*, 18 Or. 233, 22 Pac. 906; *Spencer v. Point Pleasant etc. R. Co.*, 23 W. Va. 406; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224. But ejectment will lie against a railroad company which has appropriated the street without a proper legislative grant: *Sharpe v. St. Louis etc. R. Co.*, 49 Ind. 296; *Louisville etc. R. Co. v. Liebfried*, 92 Ky. 407, 17 S. W. 870; *Bork v. United New Jersey etc. Canal Co.*, 70 N. J. L. 268, 103 Am. St. Rep. 808, 57 Atl. 412, 64 L. R. A. 836; *Wager v. Troy Union R. Co.*, 25 N. Y. 526; *Stevens v. Skaneateles R. Co.*, 42 Misc. Rep. 145, 85 N. Y. Supp. 1005.

Ejectment may be maintained by the owner of land over which there is a public highway against a telegraph or telephone company

which constructed its lines upon the highway without his consent or without compensating him: *Postal Telegraph Cable Co. v. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 390, 49 N. E. 365, 39 L. R. A. 722; *Little v. American Tel. etc. Co.*, 96 App. Div. 559, 89 N. Y. Supp. 136. But the owner of the soil in a public street cannot maintain ejectment against a person occupying part of the street with poles and appliances for lighting it, under a contract made by the city and authorized by statute, and if he uses such appliances wrongfully for private lighting in addition to their public use, he does not thereby lose his right to maintain them, but is liable to an action by the owner of the soil for an injunction or for damages: *French v. Robb*, 67 N. J. L. 260, 91 Am. St. Rep. 433, 51 Atl. 509, 57 L. R. A. 956.

f. **Maintainability for Intrusions on a Railroad Right of Way or a Turnpike.**—A railroad company, in the lawful operation and possession of its right of way, may maintain ejectment against persons intruding thereon: *Tennessee etc. R. Co. v. East Alabama etc. R. Co.*, 75 Ala. 516, 51 Am. Rep. 475; *Burton v. Laughrey*, 18 Mont. 43, 44 Pac. 406; *Central Pac. R. Co. v. Benity*, 15 Saw. 118, Fed. Cas. No. 2551. Likewise a turnpike company may maintain ejectment for an unlawful encroachment upon its roadway: *Chambersburg v. Manko*, 39 N. J. L. 496.

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### PEOPLE v. BEST.

[187 N. Y. 1, 79 N. E. 890.]

**MANDAMUS, Proceeding for, When Does not Abate on a Change of Officers.**—A proceeding by mandamus against an officer of a municipality, who, by his personal act, deprives a party of a right to which he is entitled, does not abate on the death, resignation, or removal of the officer or the termination of his term of office, but the proceeding may be continued and the writ issued against his successor in office. (p. 590.)

**MANDAMUS, Substitution of Successor in Office in Proceedings for.**—When an application for a writ of mandate has been made and argued, but written briefs are still to be filed before the decision is to be made, and the officer against whom the writ issues resigns, the substitution of his successor in office is necessary. (pp. 591, 593.)

J. Quintus Cohen and Francis G. Caffey, for the appellant.

John J. Delaney, corporation counsel, and Theodore Conolly and William B. Crowel, for the respondent.

<sup>3</sup> **HAIGHT, J.** The relator, after passing the civil service examination, had been appointed as principal assistant en-

gineer in the department of bridges in the city of New York, and as such received an annual salary of six thousand dollars. The defendant Best was the commissioner of bridges, and on the second day of December, 1904, he, in writing, notified the relator that his services had been found to be unnecessary, and he was, therefore, notified that under the provisions of the Greater New York charter, as amended (section 1543), he was suspended without pay, such suspension to take effect December 31, 1904, and that his name had been sent to the municipal civil service commission to be placed on the preferred eligible list for reinstatement in the city service. After the relator's suspension had become effective he demanded of the commissioner of bridges that he be reinstated, and, upon the commissioner's refusal, he procured an alternative writ of mandamus to compel such reinstatement. An issue of fact was formed, which was brought to trial before a jury in the following October, and resulted in a verdict in his favor. Thereupon the relator caused a notice of motion to be served asking for a final order granting a peremptory writ. Its <sup>4</sup> hearing was postponed from time to time until December 4, 1905, at which time the case was orally argued before the special term, and time was then given counsel to submit written briefs. In the meantime the defendant Best resigned his position as commissioner of bridges, and thereupon, and before any decision of the motion for a peremptory writ was made, the corporation counsel of the city, upon affidavit showing the resignation of the defendant, moved the court for an order declaring the proceeding abated. Upon the hearing of this motion the special term found in accordance with the contention of the corporation counsel that the proceeding had abated by the resignation of Commissioner Best, and thereupon the court quashed, superseded and set aside the writ.

In the case of *People v. Morton*, 156 N. Y. 136, 66 Am. St. Rep. 547, 50 N. E. 791, 41 L. R. A. 231, after discussing the question as to whether a mandamus could be issued against the governor of the state, we stated that there was another reason which must control our action in the case, and then called attention to the fact that the governor, lieutenant-governor and speaker, against whom the alternative writ had issued, had gone out of office; that their successors had been installed in office, and that the proceeding had been continued

and a peremptory writ issued to the new officials without notice to them and without their having been brought in and made parties to the proceeding. We then referred to the provisions of section 755 of the Code of Civil Procedure, and stated that it may be doubted as to whether this section operates to keep the proceeding alive; but assuming for the purposes of the case that it does, and that the relator still had the right to prosecute his proceeding, it was necessary that the new officers should be given notice and brought into the proceeding so that the peremptory writ could issue to them. It will be observed that the question as to whether the proceeding abated was not determined by us in that case. We have, therefore, given the question further consideration.

Under the common law the writ of mandamus issued in the king's name to inferior courts, officers, corporations or persons, " requiring them to do that which was particularly specified. It did not issue to the king himself, to parliament nor the judiciary, except such inferior courts as the higher courts had the power to review. Under the provisions of the Code of Civil Procedure the writ issues as an order of the court in the cases in which it was authorized at common law, and, therefore, it cannot issue to the executive, the legislative or judicial branch of the government, except to such inferior courts as are subject to review by the judicial branch of the government having such jurisdiction. In other words, the mandamus does not issue against the government itself, and for this reason the supreme court of the United States has held that the proceeding abates upon the death or resignation of the officer against whom it was issued: *The Secretary v. McGarrahan*, 9 Wall. 298, 19 L. ed. 579; *United States v. Boutwell*, 17 Wall. 604, 21 L. ed. 721; *United States v. Chandler*, 122 U. S. 643, 30 L. ed. 1244; *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 17 Sup. Ct. Rep. 225, 41 L. ed. 621; *United States v. Butterworth*, 169 U. S. 600, 18 Sup. Ct. Rep. 441, 42 L. ed. 873.

None of the acts under consideration in these cases could be enforced by any action against the government, nor could the relief sought be obtained by a mandamus against either of the three departments of the government. The proceedings, therefore, were instituted against the officer who, by his personal conduct, action or refusal to act, had deprived the party of that to which he deemed himself entitled. The proceeding



was, therefore, personal as to the officer proceeded against, and under the decisions in the cases alluded to, it abated by his death, resignation, removal or termination of his office; but in the case of a municipal corporation which could sue and be sued and against which rights of persons could be enforced, the rule was held to be different. As was stated by Mr. Justice Bradley in the case of *Thompson v. United States*, 103 U. S. 480, 26 L. ed. 521: "We cannot accede to the proposition that proceedings in mandamus abate by the expiration of the term of office of the defendant where, as in this case, there is a continuing duty irrespective of the incumbent and the proceeding is undertaken to enforce an obligation of the \* corporation or municipality, to which the office is attached. The contrary has been held by very high authority: *People v. Champion*, 16 Johns. 61; *People v. Collins*, 19 Wend. 56; *High on Extraordinary Remedies*, sec. 38. . . . The cases in which it has been held by this court that an abatement takes place by the expiration of the term of office have been those of officers of the government whose alleged delinquency was personal and did not involve any charge against the government whose officers they were."

In *High on Extraordinary Remedies* (section 38) it is said: "Where, however, a continuing and perpetual duty is incumbent upon certain public officers the rule is otherwise. And in such case the fact that the officers hold their tenure by annual election, and that their term of office has almost expired, will not prevent the court from interfering, since the duty, being continuing in its nature, may be enforced against the officers generally and their successors. And when proceedings in mandamus are pending against a public officer, at the expiration of his term of office, to compel the performance of an official duty, it is proper to revive the proceedings against his successor in office. Indeed, such practice is regarded as necessary to the administration of justice in view of the changes which are of frequent occurrence in public offices. So when the object of proceedings in mandamus against a county officer is to enforce a right against the county through such officer, the proceedings do not abate by the expiration of the term of office. In such case the action is regarded as being against the office to compel the performance of a duty devolving upon it regardless of the incumbent. And when a peremptory mandamus has been awarded against

a public officer for the performance of an official duty, but his term of office has expired and the writ has not been obeyed, the court may grant an alias peremptory writ to his successor in office for the performance of the required act."

In the case of *People v. Supervisors of Chenango*, 8 N. Y. 317, it was contended that the board of supervisors had no power over the subject except that at their annual <sup>7</sup> meeting, and as they omitted to do their duty then, they could not be compelled to do it at another time. With reference to this contention the court said: "Their neglect to perform their duty at the time required cannot nullify the statute. They, or their successors, are bound to do what was required, and on failure it may be compelled by mandamus": See, also, *People v. Comptroller of City of New York*, 77 N. Y. 45; *People v. Maher*, 64 Hun, 408, 19 N. Y. Supp. 758; *People v. Cram*, 30 Misc. Rep. 561, 63 N. Y. Supp. 1027; *People v. Shea*, 73 App. Div. 232, 76 N. Y. Supp. 679, and *People v. Coleman*, 99 App. Div. 88, 91 N. Y. Supp. 432. We consequently conclude that where a proceeding is against an officer of a municipality for the enforcement of a right of a relator against the municipality, the proceeding does not abate by the resignation, removal or expiration of term of the officer, but that it may be enforced against his successor or successors.

In this case it appears that the relator held a position under the municipal government of the city of New York; that he was suspended from his position by the commissioner of bridges without pay, upon the ground that his services were no longer necessary to the municipality. The relator, however, contended that this was not true and that his services were still needed by the municipality, and, therefore, demanded his reinstatement. If his position was correct and the defenses interposed were not established upon the trial, his right to hold the position under the municipality was existing and continuous, and was one which, we think, he had the right to enforce against the municipality by continuing his proceeding against the successor to the defendant.

As bearing upon the question as to whether a continuance is necessary, it appears that the application for a peremptory writ had been made to the court and argued, but written briefs were to be submitted, and consequently no decision had been rendered. We think that inasmuch as something remained to be done by the parties to the litigation, that briefs were

to be prepared and filed and a decision rendered, that the substitution of the successor in office was necessary. <sup>s</sup> While the code may not specifically provide the practice for substituting officers of this character, that which is provided by section 1930 of the code, which is analogous in similar cases, met the approval of this court in the case of *People v. Morton*, 156 N. Y. 136, 66 Am. St. Rep. 547, 50 N. E. 791, 4 L. R. A. 231.

The order should be reversed and the motion to have the proceedings declared abated denied, with costs in all courts.

Cullen, C. J., Gray, Vann, Werner, Willard Bartlett and Hiscock, JJ., concur.

. Order reversed, etc.

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*Mandamus Against Public Officers* is discussed at length in the note to *State v. Gardner*, 98 Am. St. Rep. 863. If an officer refuses to perform an official duty, and alternative writ of mandate issues against him, after which his term of office expires, the writ cannot issue against his successor, where the delinquency charged was personal and did not involve a claim prosecuted against the state, in which it alone was interested. Where the delinquency charged is personal, the petition for the writ abates upon the death, resignation, or expiration of the term of office of the official charged, unless preserved by statute: *People v. Morton*, 156 N. Y. 136, 66 Am. St. Rep. 547.

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## HANLON v. CENTRAL RAILROAD COMPANY OF NEW JERSEY.

[187 N. Y. 73, 79 N. E. 846.]

**RAILWAYS, Conductors on, Duties of to Passengers.**—A conductor is bound to exercise the greatest care in seeing to the safety of his passengers. (p. 594.)

**RAILWAYS, Liability of for Negligence of Conductor in Assisting a Passenger to Alight.**—Though a railway company is under no obligation to supply servants to assist a passenger in descending from a car, yet if its conductor undertakes to do so, the passenger has a right to rely on his careful performance of his undertaking and may recover of the railway for injuries suffered by the conductor's failure to use reasonable care, as where he, suddenly withdrawing his support, causes the passenger to fall. (p. 594.)

Action to recover for personal injuries. A judgment in favor of the plaintiff was affirmed by the appellate division of the supreme court of the second judicial department.

Robert Thorne, for the appellant.

J. Stewart Ross and Walter G. Rooney, for the respondent.

<sup>74</sup> GRAY, J. The plaintiff, a passenger in a train upon the defendant's railroad, had arrived at her destination in Jersey City, and, while stepping from the car to the station platform, was injured by falling to the ground. It appears from the <sup>75</sup> evidence that plaintiff was in the act of descending the car steps, when the train conductor reached out his hand to help her, taking her arm by the elbow. Before she had stepped down upon the platform, the conductor withdrew the support of his hand and she fell between the platform and the car. She had a verdict, and the judgment thereupon has been affirmed below. As the case presented a question of some novelty, if not of some interest, in the law of negligence, leave was given to the defendant to further appeal to this court.

The charge of negligence made in the complaint was that "one of the servants of the defendant, in the course of his employment, took hold of the plaintiff's arm to assist her in alighting, and, . . . negligently and without warning, removed his hand . . . and, by reason thereof," she was thrown to the ground. The jury had been instructed that there was no claim of defects in steps, or in platform, and "that the defendant was under no duty, through its employes, or otherwise, to assist this plaintiff in alighting from the train." At the close of the charge the court was then requested by the defendant to instruct the jury, further, "that the defendant was not liable for the carelessness, if any, of the conductor in performing a gratuitous courtesy to the plaintiff." This request was refused, and the appellant argues that therein the trial court erred. It must be admitted that, if the request stated the correct rule of law, the refusal of the instruction to the jurors was most material, and would entitle the defendant to a retrial of the issue.

To establish the charge of negligence it was necessary, in this case, as in all others, to prove that the defendant had failed in some legal duty, owing from it as a carrier of passengers. The legal duty must have existed and its breach must have been shown in an imperfect performance of the contract of carriage, or in the inadvertent omission, or commission, of some act in the performance, the injurious results

of which might have been foreseen by a reasonably prudent person. It is clear enough that the test here is, whether the conductor of the train, in thus proffering his aid <sup>76</sup> to the plaintiff upon her arrival at her destination, was acting within the scope of his employment. I suppose that the contract of carriage required the safe transportation of the plaintiff from the one to the other station, and that that meant, if platforms were provided for passengers, from platform to platform. The contract implied the supply of proper agencies for its performance, in engines and cars for conveyance and in engineers, conductors and brakemen to control and regulate the movements of the train and the reception and discharge of passengers. So far as the defendant's duty related to the transportation of the plaintiff upon its road, it had been performed, and the only question is whether its contractual relation with her extended to a responsibility for the act of its servant in charge of the train, in the final act of discharging her from the car. It was not bound to furnish her any personal assistance in leaving the car; for she was, so far as the case shows, in the possession of her faculties and of good health, and was capable of moving about alone. There was nothing defective about the car platform and steps. The conductor of the train stood there, however, and, voluntarily, undertook to guide and to support her in descending from the car.

The cases to which we are referred do not necessarily control, in so far as a similarity in circumstances is required, and I find none which is precisely parallel. Cases where the servant has negligently assisted a passenger in alighting from a train, which has carried him beyond his station and stops at an unsuitable place for getting off; or where the preparations for alighting were defective and unsafe; or where the servant procured, and negligently assisted, a person to get on board of a moving car, do not present quite this point, of a voluntary act of assistance proffered by the servant to, and availed of by, a passenger, where none was called for, and so carelessly performed as to be the cause of injury: *Drew v. Sixth Ave. R. R. Co.*, 26 N. Y. 49; *Foss v. Boston etc. R. R.*, 66 N. H. 256, 49 Am. St. Rep. 607, 21 Atl. 222, 11 L. R. A. 367; *Werner v. Chicago etc. R. Co.*, 105 Wis. 300, 81 N. W. 416; *Missouri etc. R. Co. v. White*, 22 Tex. Civ. App. 424, 55 S. W. 593.

"A conductor is placed in a position of responsible control by the company, and he is bound to exercise the greatest care in seeing to the safety of the passengers. He is invested with such apparent authority over them as, reasonably, to induce their confidence in and compliance with his directions and, as well, their reliance upon his acts. The situation in this case, it is true, was not such as to suggest any serious danger to the plaintiff in leaving the car; but when the conductor assumed to extend his aid in doing so, she had the right to accept it and to rely upon his act being a careful one. In the abstract, the instruction asked for was correct, that the company was not liable for carelessness in the performance by its servant of a gratuitous courtesy to the plaintiff; but, as requested, the jurors could only have understood it as referring to the situation which was presented by the evidence. Therefore, as applied to the facts, it was correctly refused.

I think we must reach the conclusion that, while the defendant was under no obligation to supply the aid of a servant in assisting the plaintiff to descend from the car, yet, as the conductor undertook to do so, she had the right to rely upon that official's careful performance of his undertaking and to hold the defendant responsible for any failure on his part to use reasonable care.

The judgment appealed from should be affirmed, with costs.

Cullen, C. J., O'Brien, Edward T. Bartlett, Werner, Hiscock and Chase, JJ., concur.

Judgment affirmed.

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*A Passenger on a Railroad is not Guilty of Contributory Negligence*, when carried beyond her destination, in attempting to alight, with the assistance of the train employes, from the cars at an unsuitable place and from a dangerously high step, without informing the railway employes of her feeble condition. If, in such case, they fail to assist her without injury, they are guilty of negligence, for which she may recover: *Foss v. Boston etc. R. R.*, 66 N. H. 256, 49 Am. St. Rep. 607. As to whether a passenger is chargeable with contributory negligence in exposing himself to danger in boarding or leaving a train, at the suggestion or direction of the conductor, see *Chicago etc. R. R. Co. v. Gore*, 202 Ill. 188, 95 Am. St. Rep. 224; *Evansville etc. R. R. Co. v. Athol*, 9 Ind. App. 296, 51 Am. St. Rep. 303; *Irish v. Northern Pac. R. R. Co.*, 4 Wash. 48, 31 Am. St. Rep. 899.

## FREEDMAN v. OPPENHEIM.

[187 N. Y. 101, 79 N. E. 841.]

**SPECIFIC PERFORMANCE Based on Title by Prescription.—**

Specific performance is properly decreed, though the title of the complainants is based on adverse possession only and must be proved by parol evidence, as where they and their predecessors have held such possession for thirty-eight years, during which time no other person has made any claim of ownership in the premises. (p. 598.)

Hugo Hirsh and Frank Rosenberg, for the appellants.

George Edwin Joseph, for the respondent.

<sup>102</sup> HAIGHT, J. This action was brought to compel a specific performance of a contract to exchange real estate, bearing date the eleventh day of September, 1901. The defendant refused to accept the plaintiffs' title on the grounds: First, that there was outstanding in one Mary Jane Houseman a one-fifth interest in the property, and second, that one James M. Cruser, who was the owner of the other four-fifths of the premises in question, had never conveyed the same. Upon the first trial of this action it appeared that in 1834 one Jacob Houseman was the record owner of the premises in question, and that he died intestate, leaving five children, four of whom conveyed their interest in 1844 to Morris H. Cruser, but no conveyance was found from his daughter Mary Jane Houseman. There was, however, evidence from one Susan L. Houseman, a niece of Mary Jane Houseman, to the effect that Mary Jane died at the age of twelve years and was buried in the Staten Island cemetery, which belonged to the church on the terrace, and that she had often seen the tombstone marking her grave; that it remained until four or five years ago when the graveyard was removed to another place; that the source of her knowledge was the statement of her father and mother and the family talk which she had often heard. If she died after her father and at the age of twelve years, she must have died intestate, unmarried and without issue, thus leaving her four remaining brothers her only heirs at law, whose title passed under their conveyance in 1844. As to the second objection made, to the effect that James M. Cruser never conveyed the title vested in him, it appears that he resided in Gloucester, Virginia, and that on the second day of June, 1845, a power of attorney purporting to have

been executed by him, in which he appointed Edwin R. L'Amoureux his attorney in fact to convey the premises. This power of attorney was acknowledged before Edward E. McLane, a notary public in the city of Norfolk, Virginia, who certified that on the second day of June in the year 1845, "personally appeared before me the within named James Monroe Cruser, to me known and acknowledged the above <sup>103</sup> letter of attorney to be his act and deed." It is now contended that this power of attorney is void, for the reason that the notary did not certify that he knew the person who appeared before him to be the person described in the power of attorney. It is also claimed that there is a defect in the certificate executed by the clerk of the Hustings court of the city of Norfolk, who, instead of certifying in accordance with the statute that he was acquainted with the handwriting of the notary, only certified that he was duly commissioned and qualified, and that full faith and credit were due to all his acts as such. L'Amoureux, as attorney in fact, did convey the premises, but for the defects referred to the appellate division reversed the judgment and ordered a new trial: 80 App. Div. 487. Upon the new trial the court found as facts: "That one Isaac F. Tysen, on or about the third day of April, 1866, purchased the aforesaid premises in Richmond county, and contracted to be conveyed by the plaintiffs to the defendant herein, from Maria A. Nesmith and Thomas Nesmith, her husband, and received a warranty deed of said premises conveying to him the fee thereof; that said deed was, on the fourth day of May, 1866, duly recorded in the office of the clerk of Richmond county, in liber 65 of deeds, page 156. That at the time of the conveyance of said premises to said Isaac F. Tysen, the same were, and ever since have been protected by a substantial inclosure, repairs to which, from time to time, were made by said Isaac F. Tysen. That immediately after the receipt of said deed the said Isaac F. Tysen entered upon and into possession of said premises under claim of title and exclusive of any other right, founding his claim under said written deed as being a conveyance of the said premises and that from time to time he has improved said premises. That said Isaac F. Tysen held possession of said premises under said deed until 1888, in which year he died intestate, and said premises descended to his only son and heir at law, Robert F. Tysen, who went into possession of said premises."



under said deed and exclusive of any other right, and who conveyed <sup>104</sup> said property to the plaintiff on August 29, 1901, by a deed which was recorded in the Richmond county clerk's office on September 12, 1901, in liber 286 of deeds, at page 466. That immediately upon receipt of said deed the plaintiffs entered upon and into possession of said premises under the said deed and exclusive of any other right; that no claim of ownership of said premises other than by said Isaac F. Tysen, Robert F. Tysen and the plaintiffs has been made since the year 1866," and, as conclusions of law, that the plaintiffs have a good and indefeasible title to the aforesaid premises by adverse possession. Again, judgment was entered for the plaintiffs, and again the appellate division has reversed. It does not appear in the order that the reversal was upon the facts, and we must, therefore, presume that the reversal was upon the law: Code Civ. Proc., sec. 1338. The findings of fact are supported by the evidence. Indeed, they are substantially copied from the undisputed testimony of the witnesses.

Inasmuch as the trial court has not based its conclusions of law upon the record title shown by the plaintiffs, the alleged defects upon which the former reversal was based may not now be raised. Had they been raised by appropriate findings, we should hesitate about condemning the record title, for the evidence with reference to the death of Mary Jane Houseman at the age of twelve years was sufficient to authorize a finding of fact to that effect, and as to the power of attorney to L'Amoureux and the deed executed by him, which were made in 1845, nearly sixty years before the trial of this action, the court might have found, under the circumstances, that they were ancient documents entitled to be admitted in evidence, notwithstanding the alleged defects in the acknowledgment and certificate referred to. Indeed, it has been held repeatedly that a deed appearing to be of the age of thirty years may be given in evidence without proof of execution if such account of it be given as may, under the circumstances, afford the presumption that it is genuine: *Enders v. Sternbergh*, 2 Abb. Dec. 31; *Jackson v. Laroway*, 3 Johns. Cas. 283; *Hewlett v. Cock*, <sup>105</sup> 7 Wend. 371; *Martin v. Rector*, 24 Hun, 27; *Ensign v. McKinney*, 30 Hun, 249; *Troup v. Hurlbut*, 10 Barb. 354; *Hoopes v. Auburn Waterworks Co.*, 37 Hun, 568; affirmed, 109 N. Y. 635, 16 N. E. 681; *McKinnon v. Bliss*,

21 N. Y. 206. But in the absence of such findings the judgment must stand or fall upon the finding that the plaintiffs have title by adverse possession.

Upon the question of adverse possession it will be found, upon comparing the findings with the requirements of the Code of Civil Procedure (sections 369, 370), that the plaintiffs' claim of title under a written instrument for upward of twenty years, in every respect conforms to the requirements of the code. It is contended, however, that the defendant ought not to be compelled to accept a title which is dependent upon parol testimony, and our attention is called to the case of *Simis v. McElroy*, 160 N. Y. 156, 73 Am. St. Rep. 673, 54 N. E. 674. It is true that in that case there was a comment from the judge writing the opinion, to the effect that a party ought not to be compelled to take title to premises where he has got to defend his title by parol evidence, but in no place in the opinion does it appear that title by adverse possession clearly established does not in some instances furnish a marketable title. This question was fully considered in the case of *Heller v. Cohen*, 154 N. Y. 299, 48 N. E. 527. In that case Martin, J., in delivering the opinion of the court, stated: "There are cases where title by adverse possession may, and will, be upheld. If there is no disputed question of fact, and the possession has been clearly adverse and undisturbed for the required period, the title may be sustained. . . . To establish title by adverse possession, it must be shown that the person holding the possession did so in open hostility to the rights of the true owner." It is quite true, as the learned judge remarked in connection therewith, that titles by adverse possession are not looked upon with favor by persons contemplating the purchase of property; but he concedes that there are cases in which the title will be sustained, and the question here is as to whether the adverse possession in this case is such as to make the title of the plaintiffs <sup>108</sup> marketable. Here we have a record title in the plaintiffs perfect except as to the two defects, to which attention has been called. We have possession shown thereunder, by uncontradicted testimony, since April 3, 1866, a period of thirty-eight years at the time of the trial of this action, and in addition to that we have the further finding that during that period no person has made any claim of ownership to the premises whatever, other than those from whom the plaintiffs have derived their

title. Our conclusions, therefore, are that the findings sustained the conclusions of law, and that in this case the title of the plaintiffs was marketable.

The order of the appellate division should be reversed and the judgment of the trial court affirmed, with costs in all courts.

Cullen, C. J., O'Brien, Edward T. Bartlett, Vann and Chase, JJ., concur.

Willard, Bartlett, J., not sitting.

Ordered accordingly.

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*A Title to Land Created by Operation of the Statute of Limitations* is generally regarded as a marketable title which will support an action for specific performance: See the note to *Menzel v. Hinton*, 95 Am. St. Rep. 677.

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## **BOYD v. UNITED STATES MORTGAGE AND TRUST COMPANY.**

[187 N. Y. 262, 79 N. E. 999.]

**PLEADING—Amendment of Complaint by Changing the Capacity in Which the Defendant is Sued.**—In an action to recover for negligence in which the defendant is described "as trustee under the will of M. B., deceased," the court may authorize an amendment of the complaint and summons by striking out the words "as trustee," etc., and thus convert the action into one against the defendant personally. (p. 602.)

**PLEADING, Amendment of Complaint, When not Deemed to Bring in a New Party.**—If the original complaint and summons are amended to change the action from one against the defendant as trustee to one against him personally, this does not bring in a new party in the sense of making one a defendant who was not such before. (p. 605.)

**LAND OWNER, When Liable to a Person Injured on His Premises.**—If an owner employs brokers to lease his premises, and an agent of a broker takes an intending tenant to view the premises and directs him to go through a particular door or passageway, where, because of the darkness, he falls from the side of a stairway which is not protected by a balustrade or otherwise, a recovery against the owner may be sustained, where the accident was due to the unguarded condition of the stairway. (p. 609.)

Theodore H. Lord and Alfred A. Wheat, for the appellant.

Howard Taylor and Charles B. Brophy, for the respondent.

<sup>264</sup> BARTLETT, J. The original summons in this action was served on July 25, 1900. In the caption Julia S. Boyd was named as plaintiff and "The United States Mortgage & Trust Co. as substituted Trustee under the Will of Matthew Byrnes, deceased, and William Z. Greene and Louis R. Taylor, doing business under the name of Greene and Taylor" were named as defendants. The original complaint which was served on the same date was entitled in the same manner. It alleged that the United States Mortgage and Trust Company was a domestic corporation, and that the defendants Greene and Taylor were partners in the real estate business; that the United States Mortgage and Trust Company "as trustee" at the time thereafter mentioned was the owner of the Lorraine Apartment House in the city of New York; that for the purpose of inducing persons to become tenants thereof the United States Mortgage and Trust Company, as trustee, had constituted as its agents the defendants Greene and Taylor, who had accepted such appointment; that on November 16, 1899, the plaintiff, being desirous of engaging an apartment, and being induced by the defendants' representations, applied at the offices of the defendants Greene and Taylor for information concerning the same, and was then and there induced by the defendants Greene and Taylor to go to the <sup>265</sup> Lorraine Apartment House and examine the apartments; that being conducted by an employé of the defendants Greene and Taylor, she went into the building, which was at the time, to the knowledge of the defendants, in an unsafe and dangerous condition, inasmuch as certain of the floors and rooms therein were unfinished; that the plaintiff was assured by the defendants Greene and Taylor that the building was safe and that she would run no risk of injury or danger in entering or passing through the same; that relying on this representation and assurance, the plaintiff allowed herself to be conducted therein by Greene and Taylor's employé, and that while thus lawfully in the building at the invitation of the defendants, and as she was being conducted through the building, the plaintiff, without fault or negligence on her part and while exercising due care, and solely owing to the negligence of the defendants, stepped into a hole or open space in the nature of a concealed trap in the floor, which could not be seen on account of the darkness of the

room, and fell to the story below; by reason of which negligence plaintiff was severely injured, to her damage in the sum of fifteen thousand dollars.

Answers denying any negligence were interposed by "The United States Mortgage & Trust Co. as substituted Trustee under the will of Matthew Byrnes, deceased," and by the defendants Greene and Taylor. Nothing more appears to have been done in the action until May, 1903, when a motion was made at the New York special term in behalf of the plaintiff for leave to amend the summons and complaint by striking out in the caption the words "as substituted Trustee under the Will of Matthew Byrnes, deceased," after the words "United States Mortgage & Trust Co." The special term denied this motion, but its order was reversed by the appellate division, which granted the desired leave to amend: *Boyd v. United States Mortgage etc. Co.*, 84 App. Div. 466, 82 N. Y. Supp. 1001. The order of the appellate division further provided that the plaintiff should serve upon the United States Mortgage and Trust Company a copy of the amended summons and amended complaint, and that the said corporation should have <sup>268</sup> twenty days thereafter within which to answer the amended complaint. Availing itself of this permission the United States Mortgage and Trust Company served a new answer under the changed caption of July 15, 1903, in which, in addition to its previous denial of any negligence, it pleaded as a separate defense that the cause of action alleged in the complaint did not accrue within three years next before the commencement of the action.

An order was subsequently entered dismissing the complaint as to the defendants Greene and Taylor, so that when the case came on for trial in March, 1905, the United States Mortgage and Trust Company was the sole defendant. The plaintiff recovered a verdict of one thousand dollars damages upon evidence which is amply sufficient to sustain the recovery; and the only substantial question presented by this appeal is whether the defendant was not entitled to have the complaint dismissed under its plea of the statute of limitations, inasmuch as more than three years had unquestionably elapsed between the time of the accident, November 15, 1899, and the date of the service of the

amended summons and complaint changing the title of the action, which was July 15, 1903.

The power of the court to permit an amendment of the summons and complaint so as to show that the defendant is sued individually instead of being sued in a representative capacity is hardly open to serious question. Section 723 of the Code of Civil Procedure expressly provides that the court, in furtherance of justice, may amend any process or pleading by adding or striking out the name of a person as a party or by correcting a mistake in the name of a party. The amendment of the summons and complaint in this case by omitting therefrom "as trustee" after the name of the United States Mortgage and Trust Company was either "striking out the name of a person as a party" or "correcting a mistake in the name of a party"; and whichever it may have been it was an amendment clearly within the power of the court to allow. The question here is not so much as to the authority to permit the amendment as to the effect of the amendment after <sup>267</sup> it had been permitted. Was the change effected by the omission of the words "as trustee" tantamount to bringing in a new party for all purposes, so that the United States Mortgage and Trust Company is to be regarded as not having been brought into court at all in its individual capacity until the service of the amended summons and complaint?

In 1878 the general term of the supreme court in the second department determined that the special term possessed the power to grant leave to amend a summons and complaint by striking out the words "as administratrix" after the name of the defendant so that the action might proceed thereafter against the defendant individually: *Tighe v. Pope*, 16 Hun, 180. The suit was brought by an attorney to recover the value of professional services performed for the defendant as administratrix of her husband's estate. In the summons and complaint the plaintiff described the respondent as administratrix and he prayed for judgment against her as such. A motion was made before trial to amend the process and pleading by omitting the words "as administratrix" and otherwise altering the complaint so as to charge the defendant in her individual capacity, but the motion was denied at special term on the ground that the proposed change would introduce a new

defendant and a new cause of action, which the court had no power to do. The general term reversed the order, holding that the motion ought to have been granted. The opinion of the general term was written by the late Mr. Justice Gilbert, one of the most accurate and discriminating lawyers who ever sat on the bench of the supreme court in this state; and his reasoning and the result which he reached have been mentioned with approval in every instance which I have been able to find in which the case has been cited either in our own or in other jurisdictions. Judge Gilbert declared that the proposed amendment would have been in furtherance of justice. "It would have worked no change in the cause of action except to make it one against the defendant personally instead of one against her in her representative capacity of administratrix. <sup>268</sup> . . . . Whether the amendment is allowed or not the same person will be the defendant, and I cannot see that any increased burden will be cast upon her by compelling her to defend personally instead of allowing her to succeed upon the technical ground that she did not incur the liability claimed in her capacity of administratrix." Precisely the same question came before the supreme court of errors of Connecticut in *McDonald v. Ward*, 57 Conn. 304, 18 Atl. 57, where it was held that a complaint against the defendant as administrator could be amended so as to make it charge the defendant in his capacity as an individual. In the opinion of that court the New York case of *Tighe v. Pope*, 16 Hun, 180, is cited and strongly approved by Loomis, J., who declared that the question involved therein "was disposed of so justly that we cannot do better than adopt the reasoning of that court"; and emphasis was laid upon the fact that the person of the defendant was the same before and after the amendment and that he was unquestionably liable as an administrator under the Connecticut statute or as an individual at common law. Among the New York cases in which *Tighe v. Pope*, 16 Hun, 180, has been accepted as authority may be cited *Munzinger v. Courier Oil Co.*, 82 Hun, 575, 31 N. Y. Supp. 737, *Dean v. Gilbert*, 92 Hun, 427, 36 N. Y. Supp. 1004, *Albany Brewing Co. v. Barekley*, 42 App. Div. 335, 59 N. Y. Supp. 65, and *Alker v. Rhoads*, 73 App. Div. 158, 76 N. Y. Supp. 808. In several other states the same liberality of amendment is allowed, as, for ex-

ample, Massachusetts, where a writ against a defendant personally can be amended so as to charge him in his capacity as administrator (*Lester v. Lester*, 8 Gray, 437; *Hutchinson v. Tucker*, 124 Mass. 240), and Alabama, where it has been held that if a defendant is sued in his representative character, the complaint may be amended so as to make the cause of action stand against him in his individual character: *Lucas v. Pittman*, 94 Ala. 616, 10 South. 603.

Assuming, as I think we must assume, that the supreme court at special term possessed authority to permit the amendment of the summons and complaint which was allowed in this case, we are confronted with the much more serious <sup>200</sup> question, in respect to which the members of the court below have differed, as to the effect of that amendment. If its effect was to bring in a new party in the fullest sense of that term—that is to say, a defendant who had never before been brought into court in this action for any purpose—then as to such defendant the action cannot be deemed to have been commenced until the service of the amended process, and such defendant would not be deprived of the benefit of its plea of the statute of limitations. As to new parties brought in by amendment a suit is begun only when they are brought in by the amendment and the service of the amended process. “If between the time of the commencement of the suit and the time when the new parties are brought in the period of limitation has expired they may plead the statute in bar of their liability although the defense may not be available to the original defendants”: *Shaw v. Cock*, 78 N. Y. 194. So far as this branch of the case is concerned, the position of the appellant here rests upon the authority of the decision last cited. The argument is that the amendment in effect added to the action an entirely new defendant, the purpose of the amendment being not merely to correct a mistake in the name of the defendant so as to continue the action against the party originally intended, but to bring in and render liable a different defendant from the first one sought to be charged. If this view be correct, it manifestly requires a reversal of the judgment in favor of the plaintiff.

On the other hand, the respondent contends and the court below has held that an amendment which changes an action



brought against a person in a representative capacity to an action against the same person as an individual does not really bring in a new party defendant. In the prevailing opinion at the appellate division, Mr. Justice O'Brien, referring to the argument that a judgment against the United States Mortgage and Trust Company as trustee would not be binding upon it individually, declares that this proposition is not determinative of the question, and says: "It is that very fact which <sup>270</sup> makes the amendment necessary, but the result of the amendment was not to bring in a new party. What is controlling in each case is whether or not a new party, that is, a new person or corporation, is, by the amendment, made a defendant. Here the mortgage company was served originally and nothing was gained in having it before the court by the new service, but for the proper entry of the judgment against it the designation was upon motion changed by striking out the words 'as substituted trustee,' etc. It follows that as it was not subsequently brought in, the statute of limitations would not constitute a bar to the maintenance of the action against it": *Boyd v. United States Mortgage etc. Co.*, 94 App. Div. 413, 88 N. Y. Supp. 289.

The question which has given rise to such a difference of opinion in the court below is one of considerable practical importance to the legal profession, and I have, therefore, sought light upon it by the examination of a large number of cases, both English and American, to which no reference has been made either in the briefs or arguments of counsel. As a result of this research, and after a careful consideration of the reasoning in support of the contending views, I am satisfied that the amendment allowed in the case at bar does not really bring in a new party in the sense of making one a defendant who was not in any sense a defendant before the process and pleading were amended. It merely changes the capacity in which the same person is sought to be charged. That person having actually been brought into court by the service of the original process, there seems to be no reason why he should not be required to contest upon the merits any cause of action growing out of the facts alleged in the complaint which the plaintiff may have against him in one capacity rather than in another, provided that he is notified by a timely and proper

amendment of the precise capacity in which the plaintiff seeks to hold him liable.

Mr. Chitty, in his well-known work on Pleading, where he discusses the general requirement that a declaration shall correspond with the process, calls attention to the fact that the <sup>271</sup> uniformity of process act (2 Wm. IV, c. 39) is silent as to the necessity of inserting any description of the character or right in which the plaintiff sues or the defendant is sued. saying: "It is probable that it was intended by that statute merely to require that the form of action should be stated and the amount of the debt indorsed, which it was perhaps considered would sufficiently inform the defendant in all actions what was the nature of the claim and the supposed liability": 1 Chitty on Pleading, 16th Am. ed., 268. He points out that it has been held in the court of common pleas that on general process, not stating the character in which the plaintiff sued or the defendant was sued, the plaintiff might declare against a defendant as executor or administrator. This was so decided in the case of *Watson v. Pilling*, 6 Moore Rep. 66, where the defendant applied to set aside the declaration and all subsequent proceedings for irregularity on the ground that the plaintiff had sued out common process against the defendant generally, but had declared against him as administrator. Opinions were delivered by Lord Chief Justice Dallas and Justices Burrough and Richardson, all of whom agreed that the application should be denied and the rule discharged. The lord chief justice said it had long since been decided that in a suit begun by the service of a common capias the plaintiff might declare in whatever action he thought proper. "The only object of the process is to compel the party against whom it is issued to appear; and when he is in court the plaintiff in his declaration discloses the form and cause of action for which he sues." Mr. Justice Burrough declared it to be "quite clear that the object of the process is merely to bring the defendant into court"; and Mr. Justice Richardson observed: "It has long since been established that on common process the plaintiff may declare as an executor or administrator; and it appears to me that this principle applies more strongly to the case of a defendant who is declared against in his representative capacity. Although it may be inconvenient to him to be at first unacquainted with

the precise nature of the plaintiff's claim, still the court <sup>272</sup> ought not either to alter or extend the practice in this respect." While other English decisions may be found at nisi prius in conflict with this view, the case cited and others to the same effect suffice to show a frequent judicial recognition of the fact that when a particular person has been served with process not specifying the precise capacity in which he is sought to be charged, he has, nevertheless, been brought into court to such an extent that he may be declared against in a representative character. In other words, an action against him has been commenced, and if the plaintiff by averments in the declaration makes manifest his purpose to charge him only in a representative capacity he may be permitted to do so without being placed in the same position as that which he would occupy if required to begin the suit anew. The court in the case supposed is deemed to have acquired jurisdiction over the person of the individual served and may continue to exercise that jurisdiction over him in any capacity in which the plaintiff seeks to render him liable, provided only that he in his own person is the only one called upon to litigate the issue proffered by the declaration.

This conclusion is not in conflict with the rule that a former judgment includes a party only in the character in which he was sued: See *Leonard v. Pierce*, 182 N. Y. 431, 75 N. E. 313, 1 L. R. A., N. S., 161, and cases there cited. As was said by Judge Haight in that case: "If the judgment was for or against an executor, administrator, assignee or trustee it would not preclude him in an action affecting him personally from disputing the findings or judgment although the same questions are involved." So here, if the present action had gone on against the United States Mortgage and Trust Company as trustee, judgment therein would not have been binding upon the corporation simply as such without reference to its representative capacity. That fact, however, is not perceived to have any bearing upon the question of the power to amend or the effect of the amendment when allowed. Nor does the decision of this court in *Shaw v. Cock*, 78 N. Y. 194, demand a different conclusion; for there the effect of the amendment permitted was to bring into <sup>273</sup> the action a corporation which had never been in it before, whereas here there was no change in the particular

defendant sought to be charged, but merely a change in the capacity in which he was sued.

I have said in the beginning of this opinion that the evidence was sufficient to sustain the recovery; but perhaps I ought to add a few more words on this subject, inasmuch as the case has been twice tried and the first judgment in favor of the plaintiff was reversed by the appellate division, because of the meagerness of proof to show just how the injuries were caused: *Boyd v. United States Mortgage etc. Co.*, 94 App. Div. 413, 88 N. Y. Supp. 289. Upon the trial now under review, however, the defects then pointed out were supplied by the testimony of Mr. J. George Payne, the broker's agent who accompanied the plaintiff to the apartment house where she was injured, from which it appears that she fell from the side of a stairway which she was ascending at his instance, and which was unprotected by any balustrade on that side. According to her statement, she was about to go toward a doorway which was lighted with the light of day, and this young man told her not to do that, but to go ahead. "To go ahead was to go through another doorway which seemed pitch black dark. I crossed the threshold, took another step, and said, 'No, you better go ahead'; he was on my left. He passed me on my right and I felt myself going down, down, and a horrible sensation. The place into which I fell was not visible at the time." Mr. Payne testified that the plaintiff would not have fallen if there had been a balustrade there.

It seems to me that the proof now presents all the elements necessary to charge the defendant with liability. The defendant owning the building employed Greene & Taylor to procure tenants for apartments therein. This employment contemplated the inspection of such apartments under the direction of Greene & Taylor. It is true there is testimony by a former officer of the defendant corporation to the effect that Greene & Taylor were directed not to take any persons to inspect the building without informing them that they would <sup>274</sup> do so at their own risk, but it does not appear that the plaintiff was ever so informed. She went to the apartment house at the instance of Greene & Taylor, conducted by their representative, whose directions as to her movements she implicitly obeyed, and while so doing she

was injured in consequence of the unguarded condition of a stairway. I think a jury might well find the owner chargeable with negligence under such circumstances and the intending tenant free from contributory negligence. Such was the view of a majority of the appellate division on the last appeal, and with that view I concur.

The judgment should be affirmed, with costs.

Cullen, C. J., Gray, Haight, Vann, Werner and Hiscock, JJ., concur.

Judgment affirmed.

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*Amendments to Pleadings* not admissible because changing the cause of action are discussed in the note to *Flanders v. Cobb*, 51 Am. St. Rep. 414. It has been held that a plaintiff suing in his individual capacity cannot amend his complaint so as to sue as executor and thereby recover in that capacity: *Fleming v. Courtenay*, 98 Me. 401, 99 Am. St. Rep. 414.

When an *Amendment to a Declaration* sets up no new matter or claim, but merely restates in a different form the cause of action, it relates to the commencement of the suit, and the statute of limitations is arrested at that point. When the amendment introduces a new and different cause of action, it is treated as a new suit, begun at the time when the amendment is filed: *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278. See, further, *Nelson v. First Nat. Bank*, 139 Ala. 578, 101 Am. St. Rep. 52, and cases cited in the cross-reference note thereto.

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## WAHRMAN v. BOARD OF EDUCATION.

[187 N. Y. 331, 80 N. E. 192.]

**BOARDS OF EDUCATION, Liability of for Acts of Subordinates.**—The doctrine of respondeat superior does not apply to a municipal board of education, and it is not responsible for any of the acts of its subordinates. (p. 611.)

**BOARDS OF EDUCATION, Liability of for Permitting Dangerous Building to be Occupied for School Purposes.**—A board of education, knowing one of the school buildings to be out of repair and dangerous, is liable to a pupil of one of the public schools who is injured by the falling of plastering from the ceiling, for the liability is not founded on the negligence of the board or its subordinates in not repairing the building, but on the ground that such board negligently permitted the building to be occupied for school purposes with knowledge of its dangerous condition. (p. 612.)

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William B. Ellison, corporation counsel, and James D. Bell, for the appellant.

Edmund F. Driggs, for the respondent.

**332** HAIGHT, J. This action was brought to recover damages for a personal injury. The plaintiff was a pupil, twelve years of age, attending Public School No. 100 in West Third street, Coney Island, in the city of New York. On the twenty-seventh day of May, 1904, while occupying a seat assigned to him in the schoolroom, the ceiling of the room broke and fell upon the top of his head, fracturing his skull and causing the injury for **333** which this action was brought. Upon the trial there was evidence given tending to show that the schoolhouse and the ceiling were out of repair; that it had been examined by inspectors appointed by the defendant from time to time, who had observed the condition of the building and that the ceiling was cracked and liable to fall, and that the result of such inspection had been reported to the defendant.

At the close of the plaintiff's case and again at the close of the evidence the defendant's counsel moved to dismiss the complaint upon the ground that the plaintiff had not shown at the time nor for several months before the accident, that there was any condition of the school building that constituted negligence of the board of education or of any of its subordinates or gave them any notice or idea that it was dangerous to have school there; that the board of education is not responsible for any of the acts of its subordinates, and that the doctrine of respondeat superior does not apply to defendant in this case, and that there is no evidence to connect the board of education with any obligation to do anything to this building to put it in condition; and also that in no case of this kind is the board of education responsible for the tortious acts of any of its officers or agents. The motions were denied and exceptions were taken.

The case was submitted to the jury upon the charge that if the jury find "that the board of education was guilty of negligence in permitting the occupation of this room by the pupils of this school on the twenty-seventh day of May, 1904, by reason of the condition of the ceiling and what they knew or ought to have known as to its condition then

the plaintiff is entitled to recover. The negligence which is the basis of the right to recover, if any, is the negligence in permitting it to be occupied for the purposes of a school-room." No exception was taken to this charge. It, therefore, must be treated as the law of the case. It consequently follows that the only question presented for review arises under the defendant's motions for a dismissal of the complaint. It is quite true that the doctrine of respondeat superior does not apply to <sup>334</sup> the board of education, and that it is not responsible for any of the acts of its subordinates.

In the case of *Ham v. Mayor etc.*, 70 N. Y. 459, it was held that the department of public instruction in the city of New York, although formally constituting a part of the city government, is charged with the performance of duties relating and belonging to the administrative branch of the state government, and, consequently, that the city was not liable for the negligence or unskillfulness of its subordinates and servants in the discharge of their duties.

In *Donovan v. Board of Education of the City of New York*, 85 N. Y. 117, it was held that while the board of education was vested with the general control and care of the school buildings and property for the purposes of public education, the care and safekeeping of such buildings were committed to ward trustees and that the board was not liable for their neglect of duty. And then again, in *Donovan v. McAlpin*, 85 N. Y. 185, 39 Am. Rep. 649, it was held that the ward trustee was not liable for the negligent acts of a servant in negligently leaving an excavation in the yard of a school building open, into which the plaintiff fell and was injured, and this, upon the ground that the trustee was a public officer discharging his duties as such and was not liable for the acts of servants employed by him, and that the doctrine of respondeat superior had no application to the case.

In the case of *Bassett v. Fish*, 75 N. Y. 303, the action was to recover damages for injuries sustained by a teacher in stepping through a hole in the floor of a schoolroom. The action was brought against the trustees, naming them, composing the board of "Gowanda Union Free School District No. One," which was a corporation. It was held that the trustees were not liable for their acts as such, for the

reason that the making of them an incorporated body and giving them corporate powers rendered the liability corporate and gave personal exemption to the individual trustee. Folger, J., in delivering the opinion of the court, said where "the duty is put upon an incorporated body by the statute <sup>335</sup> creating it, instead of upon the individuals acting as public officers, to take reasonable care that premises are in a fit state for use, those injured by the neglect of that body may have an action against it and be indemnified out of the funds vested in it by the statute, or which it is empowered thereby to raise." It was, consequently, held that where the corporation was negligent it was liable and not the individual trustees, in so far as their negligence consisted of their acts as such trustees, but in case one or more of the trustees had individually undertaken to take charge of or keep a schoolroom in repair then he might become personally liable, not as trustee, but as a servant of the board. It consequently follows that while the board of education is liable for its own negligence the doctrine of respondeat superior does not apply to it, and it is not liable for the negligent acts of any of its subordinate officers or servants.

It is now contended on behalf of the board of education that the duty of keeping the schoolroom in repair devolved upon other officers, such as the superintendent of school buildings and other subordinates, and that steps had already been taken by such officers for the repairing of this school building. Assuming, for the purposes of this case, that such duties devolved upon the subordinate officers, the board of education has not been held liable for the failure to make repairs. The only negligence charged against it upon which it has been held liable, was in allowing the school building to be occupied by pupils.

Under the provisions of the charter the board is given the management and control of the public schools of the city. While the power to repair and keep in suitable condition is given to other officers, the power to close schools seems to be vested solely in the board, and, consequently, if there is any negligence with reference to such closing, it must be that of the board.

The judgment, therefore, should be affirmed, with costs



Cullen, C. J., Gray, Edward T. Bartlett, Willard Bartlett, Hiscock, JJ. (and Chase, J., in result), concur.

Judgment affirmed.

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*A Child Attending a Public School* in a building provided by the city under a duty imposed by its general laws cannot maintain an action against the city, it has been held, for an injury suffered by reason of the unsafe condition of a staircase in the schoolhouse: *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332. See, too, the recent case of *Ernest v. West Covington*, 116 Ky. 850, 105 Am. St. Rep. 241. As to the personal liability of the school trustees for the dangerous condition of school premises, see *Donovan v. McAlpin*, 85 N. Y. 185, 39 Am. Rep. 649.

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### MEE v. GORDON.

[187 N. Y. 400, 80 N. E. 353.]

**WILL, Devise in Fee, When Cut Down by Subsequent Words.—**

A devise and bequest in favor of a testatrix's brother and her nephew and niece, share and share alike, accompanied by a direction that the share of the brother be invested for his benefit during his natural life and for the benefit of his wife and his issue after his death, does not give the brother a fee in his share, but cuts his estate down to one for life. (p. 615.)

**WILLS.—In the Construction of Wills** the object is not to seek flaws and declare them invalid, but to sustain them if legally possible. (p. 616.)

**TRUST, When Created by Will.**—Though a will does not purport to create a trust nor to devise property to a trustee, nor show that such property is to be managed by persons designated as trustees, yet a trust is created if the duties imposed on such persons are those of trustees. (pp. 617, 618.)

**WILLS, Construction of—Trust, When Created as to Remainder.** Under a devise and bequest of property to M., to be invested by the testatrix's executors for M.'s benefit during his natural life and for the benefit of his wife and issue after his death, a trust is not created as to the wife and children, but the title vests in them absolutely on M.'s death. (p. 618.)

**PERPETUITIES, Construction of Will is Against.**—It is the duty of courts to give the language used by the testator such a construction as will make the testament or limitation valid if it can be done in conformity with well-settled rules, or with his manifest intent. (p. 620.)

George Roberts, for the appellant.

George H. Taylor, Jr., Albert J. Appell and Henry W. Bookstaver, for the respondents.

<sup>403</sup> **HISCOCK, J.** This is an action for partition and involves the construction of the last will and testament of one Harriet M. Kemp, who at death was seised of the premises of which partition is sought. The underlying specific question is whether a clause in said will which, standing by itself, devised an undivided portion of the premises to one John B. Mee, plaintiff's father, absolutely, was by an immediately succeeding clause so modified as to reduce said estate to an interest for life, with remainder to said Mee's wife and children.

The learned appellate division held that the first clause was not so modified, and that, therefore, upon the death of the plaintiff's father no interest passed to the former. We are thoroughly persuaded that this decision not only defeated the plain purpose of the testatrix, but that it is unwarranted and should be reversed.

The clauses under review read as follows: "In the event of my husband and myself dying at one and the same time or within a short period of each other, I give, devise and bequeath my estate to be equally divided between my sister Elizabeth Illensworth, my brother John B. Mee, my nephew William P. Illensworth and my niece Florence C. Illensworth share and share alike. I hereby direct that the <sup>404</sup> share due my brother John B. Mee be invested by my Executors for his benefit during his natural life and for the benefit of his wife and his issue after his death."

The husband of the testatrix died a short time before she did, so that this disposition became operative upon the probate of the will.

It may be conceded, of course, that the first sentence standing alone and unmodified would have given a share to John B. Mee absolutely and without qualification. But it does not stand alone and unmodified. It is immediately, without the intervention of any other provision or purpose, followed by a second sentence which is clearly connected with and related to it, and which specifically treats of the share referred to and created in the first sentence. When this second sentence directs that "the share due my brother John B. Mee be invested," etc., it not only plainly but necessarily refers to the share which is described and created in the immediately preceding sentence. There is nothing else

for it to refer to. It is utterly irrelevant and inexplicable unless it does refer to that share. Otherwise it is predicated upon nothing, means nothing, and there is no excuse for its existence. As we look at it, even in the light of the learned opinion below and of the argument of counsel, it seems to us that this second sentence only becomes subject to the criticism of ambiguity and obscurity which is leveled at it when we deny to it its connection with the first sentence, and its natural and obvious meaning, and seek to find some other purpose which is nowhere disclosed in the will. We assume that if the testatrix had changed this entire provision, saying: "I give, devise and bequeath my estate to be divided equally between . . . my brother John B. Mee, . . . share and share alike, except that I hereby direct that the share due my brother John B. Mee . . . be invested," etc., no one would contend that the result of such provision as a whole was to create more than a life interest. It is possible that such form would have been a little plainer than the one in question, but not much, and it is too well settled to require the citation of <sup>405</sup> authorities that the intent of the testatrix will not be defeated by the injudicious use of punctuation or by the substitution for some perfectly apt word of one less so, providing her meaning can reasonably be found.

We think, therefore, that this second sentence does clearly relate to and modify the effect of the first one in so far as it relates to the interest of John B. Mee, and that it is sufficient to cut down, so far as he is concerned, the absolute estate first suggested to an interest for life even within the rules established by the cases relied upon by respondent like *Banzer v. Banzer*, 156 N. Y. 429, 51 N. E. 291.

We do not regard it necessary to review all of the cases cited for the purpose of leading us to an opposite conclusion, for the same principles prevail in all of them, the variation in expression of those principles being but the reflection of the differing phase of facts presented in each case. We shall refer at any length only to that authority which seems to be most strongly relied upon by respondents.

The *Banzer* case (156 N. Y. 429, 51 N. E. 291) held that an absolute estate created by an earlier provision in the will was not cut down to a lesser estate or interest by a later

provision, but the facts upon which that decision was reached are removed by very many degrees from similarity to those now presented to us. This is made apparent not only by an examination of the facts themselves, but by a consideration of what was said by Judge Martin. The action involved an alleged interest of a widow in real property which passed under the will of her husband. The first provision, as stated in the opinion, read: "I give and bequeath to my wife all my real and personal estate at present or hereafter in my possession; my real estate, consisting at present of a part of a house known as number 220 West 32d street." This was the only provision which in any way related to the real estate of the testator, and, as was conceded, disclosed a clear and manifest intent to devise to the wife the real estate in question and to vest in her an absolute fee to the property. As was said by Judge Martin: "No clearer or more decisive language could have been employed to effectuate <sup>408</sup> that purpose." After this provision another was inserted in the will as follows: "And my personal estate, and whatever belonged to me at my death, whatsoever and wheresoever, of what nature, kind and quality soever may be, that she shall have undisputed right to and dispose of according to her own judgment; that, after her death, my beloved children, or their executor, administrator, shall divide the same, share and share alike."

Reviewing this last clause, Judge Martin said that it was probable that it was intended to apply only to personal property, adding: "But be that as it may, we think it is quite apparent that that clause was not intended and cannot be held to affect or cut down the devise of his real estate to his wife. Its provisions are distinct and disconnected from the clause disposing of the real estate in suit. The manifest purpose of that provision was to dispose of the remainder of his property not previously and specially devised, and not to change or modify the previous provisions of his will."

It is perfectly manifest that natural and legal construction led directly to the conclusion thus stated. No reasoning can make plainer than does a mere reading of the last clause that its controlling purpose is the disposition of personal rather than of real estate, and that there is no language used which within any principle of interpretation ever adopted

sufficiently connects the last clause to the first one and reduces the absolute devise first made to a lesser estate.

But it is urged that assuming the later clause before us to be connected with and applicable to the first clause and otherwise sufficient to limit the interest of John B. Mee to one for life, said later clause is subject to such vices as to make it ineffective to accomplish such result. These alleged faults are, first, that it does not create any authorized trust for the life of John B. Mee, and, secondly, that if it does create a trust for his life it seeks to continue the same during the lives of his wife and children, and, therefore, offends against the rule relating to the suspension of the power of alienation. It is possible that if the predominating purpose in the <sup>407</sup> construction of wills was to seek faults and declare them invalid, we might be led to the conclusions thus urged upon our attention. But remembering that the opposite purpose should prevail where legally possible we have no great trouble in determining that the clause in question created a valid express trust to collect the rents and profits for the benefit of John B. Mee, during his lifetime, and that the disposition contemplated by the testatrix after his death was an absolute remainder to his wife and children. We will take up the objections urged to the clause in the order stated.

The duty of investing and administering the share in question, it is true, is imposed upon persons who are designated as executors rather than trustees, but it is a very familiar rule that the duties imposed upon a person rather than the name applied to him in the will should measure his office and position, and that where the duties of a trustee are imposed upon a person he will be regarded as a trustee rather than an executor: *Tobias v. Ketchum*, 32 N. Y. 319; *Ward v. Ward*, 105 N. Y. 68, 11 N. E. 373.

No power of sale is expressly conferred upon the executors, but they are directed to invest the share being disposed of, and if compliance with this direction involves the sale of real estate the possession of such power will be implied: *Van Winkle v. Fowler*, 52 Hun, 355, 5 N. Y. Supp. 317; *Dorland v. Dorland*, 2 Barb. 63; *Morton v. Morton*, 8 Barb. 18.

The testatrix does not say in explicit words that the rents and profits of the share with which she is dealing shall be collected and paid over to the life tenant. But there is no

possible way in which her commands with reference to it can be obeyed except by doing that very thing. It is directed that the share shall be invested, and this necessarily implies that the principal is to be kept intact. It is directed that it shall be invested for the benefit of the life tenant during his natural life, and no power is given to him of disposition by will or otherwise, and how then shall he get the benefit of this share thus invested except by the collection and payment to him of the rents and profits thereof.

<sup>408</sup> In short, by express provision and necessary implication we seem to find all of the essential elements of a familiar express trust.

Passing to the second criticism, it is true that the investment of this share is also declared to be for "the benefit" of the life tenant's wife and issue after his death, but certain prominent features of this provision lead naturally to the interpretation that an absolute disposition in remainder was intended rather than the creation of a second trust. We must remember all through the construction of this will that apparently it was formulated by the testatrix herself, and that, therefore, we must measure the language and seek her intentions somewhat from the standpoint of a layman. The testamentary scheme which we have credited to her of creating a life trust for her brother made it necessary or proper that there should be an investment of the property. Such investment would be for his benefit during life. It was also natural and appropriate that the testatrix should direct that this investment, secondarily, should be for the benefit of the wife and children. That was the fact. It was for their benefit. But we discover nothing which requires that this benefit should be derived only through the medium of a trust. The direction for investment of the share became applicable immediately upon her death and was incidental to the life trust. Its purpose would be served by carrying the principal of the share forward to the death of the life beneficiary with final distribution at that time. If an investment had been directed after the death of the life tenant for the benefit of the others, then there might be found some evidence of a purpose to tie the property up in a trust commencing at that time for a second set of lives. But such aspect is wanting. Neither does the direction that the investment should be after the death of the husband "for the

benefit" of the wife and children necessarily or even by any preponderance or argument lead to the conclusion that a trust was intended rather than a final and absolute distribution of the share. There is nothing in the quoted words which is sacred to the idea of a trust. On the <sup>400</sup> other hand, it is obvious that in no manner would the beneficiaries more thoroughly and fully get the benefit of the property than by passing it over to them in absolute remainder with unlimited right of use and enjoyment. This view and the conclusion that testatrix intended such an absolute remainder rather than a trust, are supported by what was held and said in *Crain v. Wright*, 114 N. Y. 307, 21 N. E. 401.

In that case the question arose whether a devise to the testator's widow of certain lands "to have and to hold for her benefit and support," conferred an estate in fee or for life, and the former was held to be the correct answer. Judge Vann, after reference to the provisions of the Revised Statutes that the term "heirs" or other words of inheritance shall not be requisite to create or convey an estate in fee, and that every grant or devise of real estate shall pass all the estate or interest of the grantor or testator "unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of such grant," said: "We think that the words 'for her benefit and support' indicate the reason for making the gift, rather than the intention of the testator to annex a condition or limitation to the gift. . . . Moreover, the premises were devised to her not only for her support, but for her benefit. The use of the word 'benefit' in connection with a gift of property is significant. It is consistent with a devise in fee, but inconsistent with the devise of a life estate. A gift to a person for his benefit means an absolute gift, and excludes the idea of a qualified or limited estate."

What we may regard as the natural meaning and scope of the provision for the benefit of the wife and children as framing an absolute estate in remainder is confirmed by a comparison of the provision for them with that for the life beneficiary. Some very significant omissions will be noted in the case of the former. The benefits to be derived by John B. Mee are expressly limited to his life. No such limitation is applied to his successors. Then no course is

marked out <sup>410</sup> for his share after the death of the wife and issue, as properly would have been done if the interest was limited by life, but the "benefit" is conferred upon them absolutely and without qualification as to manner or duration of enjoyment. Under all of the circumstances we think that we are amply justified in interpreting the intent of the testatrix to have been to give an absolute remainder.

As was said in *Du Bois v. Ray*, 35 N. Y. 162, where it was being contended, as here, that the testator had provided for an unlawful suspension of the power of alienation: "It is to be presumed that the testator intended to make a legal disposition of his estate, and not a void or illegal one; intestacy is what he never intended or contemplated. It is the duty of the court to give to the language used such construction as will make the instrument or limitation legal and valid, if it can be done in harmony with well-settled rules, with the manifest intent, and adjudicated cases, rather than such construction as will render them illegal and nugatory."

The judgment of the appellate division should be reversed and that of the special term affirmed, with costs to the appellant, in both courts.

Gray, Edward T. Bartlett, Werner and Chase, JJ., concur.

Cullen, C. J., concurs in result.

Judgment accordingly.

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*If an Estate in Fee is Devised* in one clause of a will in clear and decisive terms, it cannot be cut down or taken away by raising a mere doubt in some subsequent clause or by some other inference therefrom: *Platt v. Brannan*, 34 Colo. 125, 114 Am. St. Rep. 147; *Gannon v. Albright*, 183 Mo. 238, 105 Am. St. Rep. 471. However, a devise in fee may be restricted by subsequent words in the will: *Hill v. Giannelli*, 221 Ill. 286, 112 Am. St. Rep. 182.

*The Rule Against Perpetuities* is the subject of a note to *In re Walkerly*, 49 Am. St. Rep. 117. The severability of perpetuities and for-bidden trusts is the subject of a note to *Johnston's Estate*, 64 Am. St. Rep. 634.



## PEOPLE v. SEXTON.

[187 N. Y. 495, 80 N. E. 396.]

**EVIDENCE, CIRCUMSTANTIAL, Sufficient to Sustain Conviction.**—A conviction for murder, though supported only by circumstantial evidence, will be sustained where it shows a powerful motive for the commission of the crime and unexplained facts and circumstances sufficient to exclude every reasonable hypothesis other than that of the defendant's guilt. (pp. 629, 630.)

**CRIMINAL TRIAL, Cross-examination of and Leading Questions to the Prosecution's Own Witness.**—The prosecuting attorney may cross-examine his own witnesses and ply them with leading questions, where they, being relatives of the accused, prove hostile and unwilling. (pp. 631, 632.)

**CONSTITUTIONAL LAW—Dismissal of Indictment for Insufficiency of the Evidence Before the Grand Jury.**—If the legal evidence received by the grand jury is insufficient to support an indictment, or the illegal evidence received by it is the sole basis of the indictment, the person indicted has a constitutional right to move to dismiss the indictment, notwithstanding a statutory provision to the contrary, and if the motion is denied, the action of the court in denying it may be reviewed on appeal from the judgment of conviction. (p. 634.)

**INDICTMENT Based Partly on Incompetent Evidence.**—The fact that some incompetent evidence was received in connection with competent evidence, or that an incompetent witness was examined, is not a ground for quashing an indictment. (p. 635.)

**A GRAND JURY is Entitled to Decide on Its Own Methods of Procedure** in so far as they are not controlled by statute or immemorial usage having the form of law. It may decide when and in what order witnesses shall be called, and, to some extent, who shall be called. For the purpose of procuring evidence a grand jury is a distinct body, clothed with authority to conduct the examination of witnesses in any way that is not in conflict with established legal rules. (pp. 635, 636.)

**GRAND JURY, Examination of Children Before.**—A grand jury has the power to determine for itself the qualification of witnesses of tender years, so long as there is a due observance of the statutory safeguards enjoined on other tribunals in similar circumstances. (p. 636.)

**CONSTITUTIONAL LAW—Witnesses of Tender Years.**—The statute authorizing the reception of unsworn testimony of children under twelve years of age is not in derogation of the constitutional right of the citizen. (p. 636.)

Royal R. Scott, for the appellant.

Robert F. Thompson, for the respondent.

<sup>497</sup> WERNER, J. On the twenty-third day of June, 1903, the dead body of Thomas Mahaney, Jr., was found in a field which was part of a small farm occupied by him, his wife and their children, in the town of Farmington, in the county of

Ontario. The deceased had plainly been killed by some person armed with a shotgun loaded with No. 6 shot, for in his left temple there <sup>498</sup> was a large wound filled with shot of that size, surrounded over a circumference of about two and one-half inches with somewhat scattered perforations caused by the same kind of missiles, many of which had passed through the temporal bone and penetrated the brain. Suspicion pointed to the defendant as the perpetrator of the foul deed. He was arrested and indicted upon the charge of murder in the first degree. His trial and conviction followed, and he has now appealed to this court. The case of the prosecution rests wholly upon circumstantial evidence, in which the element of motive is an important factor. The principal question we have to consider is whether the circumstances arrayed against the defendant form so complete and strong a chain of evidence as to exclude beyond a reasonable doubt every hypothesis save that of his guilt. As that necessitates a recital of the essential features of the evidence submitted to the jury, it may conduce to clearness and brevity of statement if we begin the narrative with the earliest mention of the relations of the decedent and the defendant toward each other, and then continue it chronologically down to its tragic ending.

The story begins at a period preceding the year 1895, when the decedent, then a youth of eighteen, resided with his parents on a small place near the scene of the homicide, and the defendant and his wife and children lived on the premises which they occupied at the time when the defendant was charged with the commission of this crime. We are not informed as to the character or extent of the relations between these two men at that early period, beyond what may be inferred from their proximity of residence in a rural community. In 1894 the defendant had been convicted of some criminal offense, for which he had been sentenced to serve a term of one year in the penitentiary. Upon his release from incarceration at some time in 1895 he returned to his home, and soon thereafter was again arrested at the instance of his wife upon the charge of assault. At the trial upon that charge, which took place before a justice of the peace and a jury, the defendant conducted his own defense and sought to <sup>499</sup> justify or palliate the alleged offense with the countercharge that during his previous incarceration his wife had been guilty of criminal intimacy with young Mahaney, the deceased, with the result that she was then pregnant, and to

prove his assertion he compelled her to rise in the presence of the jury and pointed out her condition. In conversation with one Rush, a farmer by whom the defendant was employed at that time or soon thereafter, the latter told the former that "when he came out of the workhouse his wife admitted to him that she was in a family way, and Thomas Mahaney was the father of the child, and he said he was going to kill him, if he didn't kill him within ten years." At about that time the defendant also told one Rogers that the deceased was responsible for his wife's condition; that he had been running everywhere with her during the defendant's absence, and that he would "shoot the s—— of a b——." In the spring of 1898 the defendant applied to McLouth, the justice, for a peace warrant against the deceased, stating that the latter "abused him and wouldn't allow him to go in the road; that when he went anywhere he had to go cross lots; he didn't dare go in the road; he was afraid of him." Later in the same year the defendant was arrested for an alleged assault upon one Morris Mahaney. At that time he stated to the same justice of the peace "that Tom [the deceased] was the cause of all that trouble"; that he had sent Morris over to the defendant's place to break the windows so that the defendant would commit an assault upon Morris and then be arrested for it.

In January, 1900, the deceased was married to Mary Shea. The young couple at once took up their abode in the city of Rochester and remained away from Farmington until the fall of 1902, when they returned to reside upon the place where the deceased met his death. The record is silent as to this interval of about four years, until the deceased and his wife were about to return to Farmington in October, 1902, when the defendant had a conversation with one Ebert in the fruit evaporating establishment of one Johnson. Ebert stated that it was reported that the deceased was about to return to 500 Farmington, when the defendant said, "By God, if he comes back there I will put him out of the way," to which Ebert replied, "You had better keep your hands off from Tom; he's a pretty good man," and the defendant rejoined by saying, "I don't intend to put my hands on him to put him out of the way."

About a month before the deceased and his wife went back to Farmington, the elder Mahaney, father of the deceased,

had a talk with the defendant. The latter said, "I hear Tom is coming back to live in the neighborhood; you tell Tom, by God Almighty, if he ever comes to that street again, he won't last but a little while, and you be sure and tell it to him." The deceased and his wife returned to Farmington and took up their abode on the place where the former met his death. After they had lived there about four weeks the latter heard the defendant talking in the road. It was near midnight and was dark, so that she could not see him, but she knew his voice. She heard him say, "Mahaney, I will lay for you; I will serve twenty years for you; you're before me," or that in substance. At about this time the defendant went one evening to the house of Mrs. Mahaney, the mother of the deceased. He was intoxicated and, referring to the circumstance that the deceased had been a witness against him upon his trial for assault upon Morris Mahaney, he said he would "meet him some day for what he had done." Then there was an occasion when the defendant had a conversation at his home with one Nicholson, in which the former is quoted as saying that he would "take the liver and heart out of that man [referring to the deceased] and whittle it away as easily as he could whittle the stick that he held in his hand." Substantially of the same purport was another conversation between the defendant and the Brodericks, husband and wife, in which the defendant is charged with saying, "Tom Mahaney is a perjurer and he could take his knife and cut out his heart and chew it."

Coming down to a period about ten days before the homicide, the wife of the deceased testified that the defendant came <sup>501</sup> home from town one night, and his wife came out of the house to assist him in unhitching the horse. On that occasion she heard the defendant say "he had the ammunition to fix Mahaney now, and there were others he would fix with him; two or three others." That the defendant's wife spoke to him and told him to keep still, and he replied, "No. he wouldn't; he would fix him; he would shoot him." At about this same time the defendant, in a conversation with one Johnson, said that certain persons were meddling with his things and taking some of them, and he mentioned the names of Welch, John Mahaney and the deceased, saying: "They will find some one dead here if this thing continues."

A few days before the homicide the defendant, in a conversation with the Corneliuses, father and son, said to the lat-

ter, "You are afraid of Tom Mahaney," and upon receiving a reply in the negative he said, "I will do away with the black cuss. I will do away with the black s—— of a b——."

We now pass to the consideration of the events of the fatal day. The defendant and his wife drove to Canandaigua. The time of their going and the duration of their stay is not definitely shown. They seem to have been there as late as between 2 and 3 o'clock in the afternoon, for Kelly, a saloon-keeper, says the defendant was at his place at that hour somewhat under the influence of liquor. Behrens and the two Corneliuses, who were at work in a gravel pit near the homes of the Mahaneys and the Sextons, saw the defendant and his wife driving homeward a few minutes after 4 o'clock. The defendant's wife testified that they reached their house at about 5 o'clock, and this statement is corroborated by the daughter Anna, who assisted in unhitching the horse.

Here we pause to take up the movements of the deceased as disclosed by the record. He had been at work earlier in the day "drilling in" beans for farmer Edmonston, and returned home about 3 o'clock, bringing with him the latter's drill and drag and his own team. He started at once to "drag" a field that lay westerly from his house, leaving the drill at the barn. Having finished his "dragging," the <sup>502</sup> deceased returned to the house where his wife had been picking over beans that were to be "drilled" into the ground that had been prepared for them. He partook of a lunch, changed some of his outer clothing, hitched his team to the "drill" which had been filled with beans brought from Edmonston's, and then went back to the field beginning to drill in the southwesterly corner where the westerly line, which separates the premises of the deceased from those of the defendant, runs on an angle that required the "drilling" of a number of short rows of varying length before this planting process could be continued in rows extending north and south from one end of the field to the other. The "drill" had been driven back and forth on these short rows four times and had been turned at a point as near as possible to the west fence of the deceased, when the shot was fired which caused his death, and the team started for the barn on a fast trot. This was at about 5:30 in the afternoon.

At this juncture it will be desirable to take a more critical view of the scene of the crime and its surroundings. The

premises occupied by the deceased and his wife consisted of between five and six acres of land fronting on a road running north and south between Canandaigua, in the county of Ontario, and Palmyra, in the county of Wayne. Next north and fronting on the same road were the premises of the elder Mahaney, consisting of ten or twelve acres, and flanked on the north by a road running east and west. The premises of the defendant were next south of the premises of the deceased, fronting on the north and south road, extending westerly to the westerly line of the premises of the two Mahaneys, father and son, and from thence continuing southerly on an obtuse angle to the east and west road above mentioned, thus bounding the premises of the deceased both on the south and west. That portion of the defendant's lands which lay westerly of those occupied by the deceased consisted wholly of swamp, with the exception of a knoll about fourteen rods square, which had been planted with strawberries. The place where the body of the deceased was found is near the line <sup>503</sup> which forms the western boundary of his premises and the eastern boundary of the land of the defendant. Along the line of the fence marking this boundary there are some bushes and a few swamp trees, which obstructed the view between the Mahaney land, where the body of the deceased was found, and the strawberry patch on the defendant's land. At a point six feet west of where the body of the deceased was found and fifteen inches west of this boundary fence there stood upon the defendant's land a small tree overgrown with young vines.

The gunshot report above referred to had been heard by a number of persons. One of these, Bertha McCauley, who lived to the northwest of the locus in quo, was picking cherries at that time. She saw the defendant coming down the path toward the swamp. Within fifteen minutes of her first sight of him she heard the report of a gun, and then she saw Mahaney's team running toward the barn. At the coroner's inquest the defendant admitted that he had last seen the deceased alive at about 5:30 in the afternoon before, which was the day of the shooting; that the deceased was then "drilling" on the west side of his lot, and that he, the defendant, was then at the berry patch on his premises. The defendant's daughter saw him going toward the berry patch and this is corroborated by his wife, although both of these witnesses say the defendant was carrying a berry crate, while

that is denied by the witness McCauley, who says she saw nothing in the defendant's hands. The defendant's daughter thought her father had returned to the house before she heard the shot, and at the coroner's inquest the defendant's wife testified that in the course of about one-half hour after she and her husband had returned from Canandaigua, the latter came into the house, when she asked him if he had heard a shot, to which he replied in the negative, and then he asked her if she had heard one, to which she said she had.

Meanwhile the wife of the deceased, having finished her task of picking over beans, started to take them out to the barn. There she saw the driverless team. In the same <sup>504</sup> instant Mrs. Mahaney, the mother of the deceased, came along, and a search was instituted which resulted in the finding of the body of the deceased at the place above indicated. The body lay on the stomach, with the left side of the face and head upon the ground in a pool of blood. The left temple had been shattered by a volley of shot, well bunched, most of them penetrating the superficial structure of the skin, and many more passing into and through the membrane of the brain. One hundred of these missiles were within an area of about two and one-half inches, extending from the top of the nose to the last posterior shell of the ear, and there were others scattered in the face, neck and scalp. The left eye had been punctured and a large portion of its contents had leaked out. The cause of death was plainly visible and unmistakable. The tree, above referred to as standing upon the land of the deceased at a point about fifteen inches from the barbed-wire line fence and in a direct line between the strawberry patch and the place where the deceased had paused to turn his drill, had been perforated with shot, covering a space of about sixty-five one-hundredths of a foot in size, which was about five feet four inches from the ground, and the vine which clustered about the tree had been cut off at the same place.

The news of the tragedy spread rapidly, and soon the neighbors within a radius of half a mile or more gathered in the stricken home, but the Sextons, next-door neighbors, were not there. At about 7 o'clock in the evening Mrs. Behrens, who had been at the Mahaneys since the discovery of the tragedy, went after the Welches, who were also neighbors. In going she passed the defendant, who asked her what was the matter, to which she replied "Nothing much," and in returning

from the Welches' the party met the defendant, who said to Welch, "Ed, don't go there." Later that night, at about 11 o'clock, when some of the neighbors were still at the Mahaneys', the defendant went to the house of Cornelius, who asked the defendant what he wanted, to which the latter replied, "Have you seen my wife? She is crazy; she is throwing things around the house, and has stole my gun and <sup>505</sup> is shooting, shooting everybody. You know I have got a baby to nurse; come out and help me in my trouble." Half an hour later he appears at the door of the Mahaneys. A Mrs. Hughes, who was there, heard some one muttering outside of the house and went to the door, where she found the defendant, who said, "I want my wife," and upon being told that she was not there he left the house. This is corroborated by the widow of the deceased, who heard Mrs. Hughes talking to some one to whom she said, "You are not wanted here." The significance of this testimony becomes apparent when we refer to the evidence of the defendant's wife, to the effect that after her return from Canandaigua she did not leave her house again that day.

Having thus outlined the salient circumstances and events which preceded and surrounded the homicide, it yet remains to summarize the circumstances bearing upon the character and ownership of the weapon by means of which the death of Mahaney is thought to have been effected. That Mahaney's death was caused by a shot from a gun loaded with No. 6 shot cannot be doubted. The character of the wound, the number and nature of the missiles found in the body, and the perforations and abrasions upon the tree and vine referred to, all preclude the possibility of any other hypothesis. That the defendant had possessed a shotgun as late as two weeks before the homicide can hardly be doubted, for his wife testified to that effect. She said it had disappeared at about that time with a razor and some other articles, and both Mr. and Mrs. Lawrence say the defendant told them the same story. Behrens had seen the defendant engaged in shooting with a shotgun back of the Cornelius barn a week or two before the homicide, and this is corroborated by the younger Cornelius, who says it was the same gun which he had frequently seen in the defendant's possession; that it was a twelve-gauge gun, for which he at one time purchased some No. 6 shot at defendant's request. It also appears that the



defendant borrowed a rifle from Mr. Lawrence about two weeks before the homicide, but it had been returned at least two days before <sup>506</sup> that event. After the homicide some empty twelve-gauge shells were found in the swamp and at other places on the defendant's premises. On the morning after young Mahaney's death his father found a twelve-gauge gun wad a little to the east of where the body had lain, and other gun wads of the same size were later found a foot or so west of the tree which had been perforated with shot. The gun which the defendant had owned was not found, and was not accounted for at the trial, except as stated in the testimony of the defendant's wife and of Mr. and Mrs. Lawrence.

Thus we have a story containing, in varying degree, the different elements which are essentials in a case of circumstantial evidence. A powerful motive, fed and fostered by the periodical recollection and recital of the decedent's supposed invasion of the defendant's connubial bed—a wrong which no man can ever forget, and which few have ever attempted to forgive—a series of bitter denunciations and threats of violence against the deceased by the defendant, beginning soon after his discovery of the reputed liaison between his wife and the deceased, and continuing until the marriage of the latter and his removal from the neighborhood; a renewal of these denunciations and threats when it was reported that the deceased had decided to come back to the neighborhood, and again continued practically down to the fatal day, under circumstances indicating that this was the subject uppermost in the defendant's mind when his passions were inflamed by indulgence in intoxicating liquor; the sudden and mysterious disappearance of the shotgun which the defendant had owned and openly possessed for a long time down to within two weeks of the homicide; the defendant's trip to Canandaigua on the day of the homicide and his return home somewhat the worse for liquor; his presence in the swamp lot at the time of the shooting when he and the deceased were separated by only a few rods of space and no other human being was near; the firing of the deadly charge and its train of indications pointing to the locality where the defendant was seen as the spot from whence the shot had <sup>507</sup> proceeded; the defendant's aloofness and apparent indifference during the hours following the tragedy,

when all the other neighbors of the bereaved family had gathered to assist and comfort them; his later visits that night to the homes of Cornelius and the deceased, pretending to be in search of his wife, who was then under his own roof, where she had been every moment since the shooting; and his statement to the effect that his wife had stolen his gun and was threatening to shoot everybody, although he had said to the Lawrences two weeks before the homicide that his gun had disappeared. These facts and circumstances, uncontradicted and unexplained, were submitted to a jury of the defendant's peers, under a charge so fair and favorable that no exception was taken, and a verdict of guilty was rendered. After a most careful and searching scrutiny of this array of facts and circumstances, we find ourselves unable to assent to the appellant's contention that they are insufficient to sustain this judgment of conviction. The chain is not equally strong in all its parts, but it is so connected that we think it was competent for the jury to decide that, beyond every reasonable doubt and to the exclusion of every other hypothesis, the defendant was the guilty slayer of the defendant. With that decision, resting upon such a foundation, we have no power to interfere, unless the defendant's substantial rights have been injuriously affected in the conduct of the trial.

The learned counsel for the appellant has very ably presented for our consideration various objections, exceptions and alleged irregularities in the trial as grounds for the reversal of this judgment of conviction. Addressing ourselves first to his criticism that the general attitude of the learned trial justice, as evidenced by his rulings, his charge and his indulgence of the district attorney, was calculated to influence the jury against the defendant, we deem it no less a pleasure than a duty to say that rarely are we called upon to decide an appeal in a capital case in which there is so little to criticise upon these grounds. We have had frequent occasion of late to deprecate the methods employed by some district attorneys in criminal <sup>508</sup> trials, and to disapprove of the complacency of some trial judges in dealing with the most obvious misuses of a public prosecutor's official prerogatives and powers. It is quite natural that the discussion of such matters in the opinions of courts should sometimes suggest to the members of the profession the idea of raising similar questions in cases where an impartial judicial examination will disclose but little

to criticise and nothing to condemn. In such instances we should be no less willing to express our approval than we are in other circumstances to publish our denunciation of what is unfair, unprofessional or unjust. Applying this rule to the case at bar, we feel bound to say that we are impressed by the evident fairness and impartiality of the presiding justice. There was nothing in his attitude or rulings, as disclosed by the record, that suggests the slightest bias, and his charge to the jury was so judicial, so comprehensive and so free from error as to evoke no exception from a defendant's counsel, whose zeal and learning have uncovered every possible point in the case. Nor can we find any just ground for unfavorable criticism of the district attorney's conduct of the trial. While a prosecuting officer is vested with some quasi-judicial powers which, in these days, are unfortunately quite as often honored in the breach as in the observance, we must not forget that the prosecution of crimes cannot be conducted in the carefully weighed and measured language of judicial opinions. The precise latitude within which prosecutions may properly be presented cannot be circumscribed by any exact standard, for no two cases are alike, and the courts have neither power nor inclination to regulate the manners and methods of district attorneys, so long as they do not openly offend against professional propriety or interfere with the due and orderly administration of criminal justice. We think that when the prosecution of the case at bar is subjected to the test of this necessarily flexible rule, it is but simple justice to say that the district attorney was no more zealous and no less judicial than he had a right to be.

The specific assignments of error urged upon our attention <sup>500</sup> may be disposed of with a very brief discussion. It is said that the district attorney was permitted to cross-examine and impeach his own witnesses, the defendant's wife and daughter. The reason of the rule upon which that contention is based suggests the exceptions that are necessary to its practical application. The party who calls a witness certifies his credibility. Therefore, a witness may not be impeached by the party at whose instance he testifies. This general rule is subject, however, to the exception that, when a witness proves hostile or unwilling, the party calling him may probe his conscience or test his recollection, to the end that the whole truth may be laid bare; and the extent to which this

may be done depends upon judicial discretion exercised in the light of the circumstances in which the question arises. That these two persons, wife and daughter of the defendant, were unwilling witnesses against him was manifest from their relations to him and from their apparent lack of recollection. It was, therefore, permissible for the district attorney to ply them with leading questions; and even to cross-examine them: *Becker v. Koch*, 104 N. Y. 394, 58 Am. Rep. 515, 10 N. E. 701; *People v. Kelly*, 113 N. Y. 647, 21 N. E. 122. It is to be observed, moreover, that the question is really academic, for these witnesses contradicted none of their earlier statements tending to favor the defendant, but simply reiterated them.

It is said that a map purporting to show the locus in quo was improperly admitted in evidence. The specific complaint in that behalf is that the map contained certain red lines designed to represent the path followed by the defendant in going from his house to the scene of the homicide. The answer to this objection is that, although the features of the map were verified by the examination of the surveyor who made it, there is not a word of testimony in the record to indicate what these red lines referred to. They are not identified or characterized on the map itself, and no one examining it could form any definite idea as to the meaning or purpose of these lines. It may be added, also, that even if it were admitted that these lines indicated the path pursued by <sup>510</sup> the defendant, that circumstance would add nothing to the probative force of the people's evidence, since the defendant's presence in the strawberry patch at about the time of the homicide was proven out of his own mouth at the coroner's inquest and established upon this trial by the duly authenticated minutes of that proceeding.

It is also claimed that the learned trial court erroneously refused to permit defendant's counsel to cross-examine the people's witness, Jacob Cornelius, from the minutes of his evidence given at the coroner's inquest. It appears that the coroner, while a witness before the grand jury, inserted in his coroner's minutes the name "Thomas Cornelius, Jr." upon a page which, but for such interlineation, would seem to have contained a continuation of the evidence of Jacob Cornelius given at the inquest. At the trial, during the cross-examination of this Cornelius, defendant's counsel put some questions to him which assumed that the statements appear-

ing upon that part of the minutes referred to the evidence that had been given by him before the coroner. The witness was a Dutchman, illiterate and ignorant, and the examination had become badly involved, when the question arose whether that portion of the coroner's minutes referred to contained his evidence or that of Jacob Cornelius, Jr. This was the situation when the court intervened with the suggestion that the defendant's counsel could ask the witness about anything that he was understood to have testified to before the coroner, "but it is not fair to assume that he did make the statements before the coroner that are under the name of Jacob Cornelius, Jr. You may ask him, however, if he made those statements in view of the fact of these corrections." While the confusion caused by the coroner's interlineation of the name "Thomas Cornelius, Jr.," in his minutes does not appear to have been very satisfactorily cleared up, it is evident from the trial court's concluding sentence above quoted that the defendant's counsel was in fact not deprived of any opportunity to cross-examine Jacob Cornelius. The only limitation imposed by the court was one that seems to have been proper <sup>511</sup> under the circumstances, and we, therefore, conclude that this ruling was not erroneous or prejudicial to the defendant.

It is further urged that the defendant was deprived of a substantial right in the denial of his motion to dismiss the indictment upon which he was tried. This motion was made, not at the trial of the defendant, but at a previous term of the court held by Mr. Justice Davy, and upon three separate grounds: 1. That improper and illegal evidence was introduced before the grand jury; 2. That the statements of two unsworn witnesses were received by the grand jury without any effort by the court to ascertain whether these witnesses, being children under twelve years of age, understood the nature of an oath, and, if not, whether they were possessed of sufficient intelligence to justify the reception of their evidence; 3. That the legal evidence produced before the grand jury was insufficient to warrant the finding on an indictment. Neither of the grounds upon which this motion was made is recognized by the Code of Criminal Procedure (section 313) as a sufficient reason for setting aside an indictment; but in the case of *People v. Glen*, 173 N. Y. 395, 66 N. E. 112, we had occasion to pass upon the validity of that

section. It was there decided to be clearly within the legislative power to restrict the grounds upon which such a motion could be made, so long as the restraint imposed related solely to matters of practice or procedure, but that the section referred to was not intended to affect, and could not curtail, any of the constitutional rights of an indicted defendant. At least two of the grounds upon which the motion was made to dismiss the indictment herein do relate to the defendant's constitutional rights, for a grand jury can receive none but legal evidence (Code Crim. Proc., sec. 256), and should only find an indictment when all the evidence, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by a trial jury: Code Crim. Proc., sec. 258. Whenever it clearly appears, therefore, that the legal evidence received by a grand jury is insufficient to support an indictment; or that illegal evidence is the sole basis for <sup>512</sup> an indictment, the person indicted has a constitutional right to make a motion to dismiss, notwithstanding the provisions of the code to the contrary. The right to make a motion upon these substantial grounds, and to have it decided in the first instance, necessarily implies the right to have a review of an adverse decision, at least in the absence of any statutory limitation, and so we will treat this as one of the questions that may be reviewed by this court upon appeal from a judgment of conviction in a capital case. While this somewhat extended preliminary discussion of the question is pertinent upon the defendant's right to have a review of the denial of his motion to dismiss the indictment, it is really of little practical importance when considered in the light of the record. The averments of the affidavits upon which the motion was made were vague and unsatisfactory. The court's attention was directed to no illegal evidence that was presented to the grand jury, and the very general charge that the evidence was insufficient is supported by no direct or definite statement. In short, the moving affidavits are simply a collection of the broadest generalizations stated upon information and belief. The learned trial justice before whom the motion was made had the minutes of the grand jury before him. He decided that the evidence was sufficient to sustain the indictment, and that none of the evidence was illegal. That decision is clearly supported by the record before us, and it is also fortified by the presumption that an indictment

is found upon legal and sufficient evidence: *People v. McIntyre*, 1 Park. Cr. Rep. 372; *United States v. Wilson*, 6 McLean, 604, Fed. Cas. No. 16,737.

There is yet another phase of the motion to dismiss the indictment that needs to be briefly considered. It is said that two of the children of the defendant, one of them nine years of age and the other only six, were witnesses before the grand jury, although they were neither sworn nor examined by the justice who presided at the term during which the indictment against the defendant was found. The Code of Criminal Procedure (section 392), provides that "whenever in any <sup>518</sup> criminal proceedings a child actually or apparently under the age of twelve years offered as a witness does not in the opinion of the court or magistrate understand the nature of an oath, the evidence of such child may be received, though not given under oath, if, in the opinion of the court or magistrate, such child is possessed of sufficient intelligence to justify the reception of the evidence. But no person shall be held or convicted of an offense upon such testimony unsupported by other evidence." As we understand the argument of the learned counsel for the appellant, it is, in substance, that the evidence of these children could not legally be received by the grand jury until after such a preliminary examination as is provided for in section 392, and that no one had the right to make that examination but the justice who presided at that term of court. If we assume for the instant the soundness of counsel's contention, that does not affect the validity of the indictment. The justice before whom the motion to dismiss was made and who examined the grand jury's minutes decided that there was sufficient other evidence to sustain the indictment. That is in accord with the general rule which is well expressed in Underhill's work on Criminal Evidence (section 26) as follows: "The fact that some incompetent evidence was received in connection with competent evidence, or an incompetent witness examined, is not ground for quashing an indictment, for these errors may be corrected upon the trial." But we do not think it is necessary to dispose of the question upon this last-mentioned ground. A grand jury, although for some purpose a part of the court in connection with which it is convened, is in some aspects a separate and independent tribunal, free from the restraint of the court, and at liberty to decide upon its

own methods of procedure in so far as they are not controlled by statute or immemorial usage having the force of law. One of the attributes and powers of this independent existence is to decide when and in what order witnesses shall be called, and, to some extent, who shall be called. For all the ordinary purposes of procuring evidence <sup>514</sup> a grand jury is a distinct body clothed with authority to conduct the examination of witnesses in any way that does not conflict with established legal rules. The court has no general control over witnesses summoned before a grand jury except to punish them for contumacy or contempt, and we cannot see upon what theory it could be held that a grand jury has not the power to determine for itself the qualifications of witnesses of tender years so long as there is due observance of the statutory safeguards enjoined upon other tribunals in similar circumstances. It requires no violent stretch of language or of legal rules to apply the terms of the statute (Code Crim. Proc., sec. 392) to grand juries as well as to courts and magistrates, and when that is done it ends the discussion here, for we are informed by the district attorney's affidavit that the statute was literally complied with in the examination of these children. The statute authorizing the reception of the unsworn testimony of children under twelve years of age is not in derogation of any constitutional right of a citizen: *People v. Johnson*, 185 N. Y. 219, 77 N. E. 1164.

Other matters are pressed upon our attention by the able and zealous counsel for the appellant, but we do not regard them as of sufficient importance to justify the further continuance of this discussion. Having reviewed this case with a full realization of the solemn responsibility that attends an issue of life and death, our duty compels us to decide that the evidence is sufficient to support the judgment of conviction herein, and that the record discloses no errors which will warrant the reversal of that judgment.

Cullen, C. J., Gray, Haight, Willard Bartlett and Chase JJ., concur.

Vann, J., not voting.

Judgment of conviction affirmed.

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*Circumstantial Evidence* in criminal prosecutions is discussed at length in the note to *State v. Hudson*, 97 Am. St. Rep. 771.



*The Right of a Party to Impeach His Own Witness* is discussed in the notes to *Lodge v. State*, 84 Am. St. Rep. 57; *Champ v. Commonwealth*, 74 Am. Dec. 398.

*Proceedings Before Grand Juries* are discussed in the note to *Commonwealth v. Green*, 12 Am. St. Rep. 900. A grand jury is an informing and accusing body, rather than a judicial tribunal, and it may base an indictment upon the knowledge of one or more of its members: *Commonwealth v. Woodward*, 157 Mass. 516, 34 Am. St. Rep. 302. It may properly act on the knowledge of one of its members communicated to his fellows under no other sanction than the grand juror's oath: *Commonwealth v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NORTH DAKOTA.**

**GREEN v. TENOLD.**

[14 N. Dak. 46, 103 N. W. 398.]

**MECHANICS' LIENS—Homestead in Public Land.**—Land held under the United States homestead laws prior to the issuance of patent is exempt from mechanics' liens based on contracts made while the title remains in the United States. (p. 639.)

**MECHANICS' LIENS—Interest in Land.**—No mechanic's lien can attach to land or to a building thereon unless the owner of the building has some interest or estate in the land out of which the lien can be enforced, and such building cannot be sold separately from the land to satisfy the lien, except in cases of leasehold interests that have been forfeited or of encumbrances on the land when the materials are furnished. (p. 640.)

Spencer & Sinkler and E. R. Sinkler, for the appellant.

E. S. Peterson, for the respondent.

<sup>48</sup> **MORGAN, J.** This is an action to foreclose a mechanic's lien upon a building. The plaintiff's assignor furnished the lumber for such building in August, 1896. At that time the land on which the building was placed was occupied by the defendant under a homestead entry made pursuant to the laws of the United States. The defendant relies upon that fact to defeat the plaintiff's lien. After the plaintiff had rested his case he moved to amend the prayer of his complaint to the effect that he be declared entitled to a judgment against the defendant for the sum of seventy-four dollars and two cents, and that such judgment be declared a lien upon the buildings described in the complaint; that a special execution issue against said building, and that the same be sold under such execution; that the purchaser of such building at said sale be authorized to remove the same from the land on

which it was placed within forty days after the sale thereof. This amendment was allowed, and at the close of the trial the court made findings of fact and conclusions of law in plaintiff's favor, and judgment was entered ordering the sale and removal of such building in accordance with the relief asked in the amended complaint. The defendant appeals from the judgment, and asks for a review of the entire case under section 5630 of the Revised Codes of 1889. Among other contentions, it is insisted by the appellant that the plaintiff is not entitled to a lien either upon the land or upon the building erected thereon. The basis of this contention is that the title to the land on which the building was erected was in the United States, and that such land is exempt from sale under execution for any debts created while the title remained in the United States, and that under the law of this state no lien <sup>49</sup> on buildings separate from the real estate on which the building is situated is given for materials furnished for the erection of such buildings in cases where the interest of the occupant of the land who procured the materials cannot be sold under execution to satisfy the lien.

It is well settled in this state and in others that lands held under the United States homestead laws, prior to the issuance of patents, are exempt from mechanics' liens based on contracts made while the title to such lands remained in the United States: *Mahon v. Surerus*, 9 N. Dak. 57, 81 N. W. 64; *Gull River Lumber Co. v. Briggs*, 9 N. Dak. 485, 84 N. W. 349; *Kansas Lumber Co. v. Jones*, 32 Kan. 195, 4 Pac. 74; *Paige v. Peters*, 70 Wis. 178, 5 Am. St. Rep. 156, 35 N. W. 328; *Fink v. O'Neill*, 106 U. S. 272, 1 Sup. Ct. Rep. 325, 27 L. ed. 196. In *Mahon v. Surerus*, 91 N. Dak. 57, 81 N. W. 64, this court held that, under the mechanic's lien law as it then existed under the Compiled Laws, a lien was given on the building separate from a lien on the land, and that where the occupant had no title to the land the lien could be enforced against the building, and the building removed from the land after sale under foreclosure of the lien. Section 5480 of the Compiled Laws of 1887 authorized such sale and removal. Said section 5480 was repealed under the revision of the code in 1895. In *Gull River Lumber Co. v. Briggs*, 9 N. Dak. 485, 84 N. W. 349, this court held that the effect of the repeal of section 5480 of the Compiled Laws of 1887 is to destroy the right to a lien upon a building when the

lienee has no interest in the land, or the land is exempt from sale under liens, as in this case. The court said: "In all other cases the building must remain upon the land; but a lien upon a building that could in no manner be utilized would be so barren of benefits that we cannot presume the legislature ever intended to confer it." That case holds, in construing this same statute, that no lien attaches to the land or to the building unless the owner of the building has some interest or estate in the land out of which a lien can be enforced, and that a building cannot be sold separately from the land to satisfy a lien except in the cases prescribed by sections 4794 and 4795 of the Revised Codes of 1889; that is, in cases of leasehold interests that have been forfeited, and in cases of encumbrances on the land when the materials are furnished. We think the latter case decisive of the case at bar. This decision is assailed by counsel for respondent. In our opinion, the question of its correctness is not now open for discussion. A rule of property was announced by it, <sup>50</sup> under which many and important interests have arisen. Under these circumstances the decision should not be changed, even were it conceded to be without authority to sustain it, or a doubtful construction of the statute: *Smith v. McDonald*, 42 Cal. 484. It has the support of authority, however: *Kellogg v. Little & Smythe Co.*, 1 Wash. 407, 25 Pac. 461; *Coddingtion v. Hudson County Dry Dock Co.*, 31 N. J. L. 477; *Babbitt v. Condon*, 27 N. J. L. 154; *Ranson v. Sheehan*, 78 Mo. 668. No judgment for the value of the materials furnished can be ordered, as more than six years has elapsed since the materials were furnished.

The judgment is reversed, and the district court is directed to dismiss the action.

Young, J., concurs.

**Mr. Justice Engerud Dissented** and expressed the opinion that the reasons assigned for the decision in *Gull River Lumber Co. v. Briggs*, 9 N. Dak. 485, 84 N. W. 349, were unsound, and that the case should be overruled. He stated that, in his opinion, it was unnecessary in that case to consider the question as to whether a building could be sold under a mechanic's lien and be removed, and that he did not consider that such decision had become a rule of property, but, on the contrary, under the conditions existing in the state, he was convinced that adherence to such decision would do a great injury to a large number of meritorious claimants, who had extended credit

for labor and material to the settlers on public lands, in the belief that they were fully protected by the lien laws of the state. "My investigations have convinced me that the decision in *Gull River Lumber Co. v. Briggs* is without authority to sustain it, and violates both the letter and spirit of the statute. I find no case which sustains the views expressed in *Lumber Co. v. Briggs*. The case of *Kellogg v. Little & Smythe Co.*, 1 Wash. 407, 25 Pac. 461, is not in point. That case involved the construction of the mechanic's lien law of that state, which was construed (erroneously, I think) to create a lien on substantially the same terms as the mechanic's lien law in New Jersey and some other states, which differ widely in language from our statute. Under such statutes a lien cannot exist upon a building unless it also attaches to the land itself. In other words, the lien attaches upon the building merely as an incident to the lien on the land. They have been so construed, not because the legislature failed to provide specifically for the separate sale of the building independently of the land, but because the language used in those sections of the act which prescribe the conditions under which a lien can be claimed did not permit a lien to attach to the building unless it also attached to some estate in the land itself: *Coddington v. Hudson County Dock Co.*, 31 N. J. L. 477; *Babbitt v. Condon*, 27 N. J. L. 154; *Belding v. Cushing*, 1 Gray, 576; *Wagar v. Briscoe*, 38 Mich. 587; *Church v. Griffith*, 9 Pa. 117, 49 Am. Dec. 548."

Judge Engerud contended that under the statutes of other states very similar to those of North Dakota it has been uniformly decided that a mechanic's lien may exist on the structures, and be enforced separate and apart from any lien on the land, and cited as sustaining his contention: *Bledsole v. Peters*, 79 Ala. 133; *Forbes Mosquito Fleet v. Yacht Club*, 175 Mass. 432, 56 N. E. 615; *Sawyer & Austin Lumber Co. v. Clark*, 172 Mo. 588, 73 S. W. 137; *Ombony v. Jones*, 19 N. Y. 234, and *Dean v. Pyncheon*, 3 Pinn. 17. In conclusion he said: "I feel safe in saying, from my knowledge of conditions in this state, that the rule in *Gull River Lumber Co. v. Briggs*, 9 N. Dak. 485, 84 N. W. 349, has never become the law by common opinion and practice. I think it is extremely improbable that any person has bought land burdened with a mechanic's lien, such as the one in question, paid the purchase price, and knowingly taken his chances on its validity or invalidity in reliance on the previous decision in question. If any such case could be found, such an isolated case of individual hardship should not weigh as a feather against our duty to declare the law as it is, and thus protect and enforce the rights of the far greater number who have, in ignorance of that decision and in reliance on the plain language of the statute, extended credit for labor and material to aid in the upbuilding of this new state."

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*A Lien upon Land Entered as a Homestead*, but for which the patent has not issued, cannot, under section 2296 of the Revised Statutes of Am. St. Rep., Vol. 116—41

the United States, be acquired for machinery placed thereon, to secure payment therefor. But where the removal of the machinery will not materially impair the realty, a lien may be claimed on the machinery itself under the Wisconsin statutes: *Paige v. Peters*, 70 Wis. 178, 5 Am. St. Rep. 156.

## COLONIAL AND UNITED STATES MORTGAGE COMPANY v. NORTHWEST THRESHER COMPANY.

[14 N. Dak. 147, 103 N. W. 915.]

**LIMITATION OF ACTIONS—Foreclosure Proceedings.**—An action to foreclose a real property mortgage is an action in personam and not in rem, and the absence from the state of the person against whom the cause of action accrues stays the running of the statute of limitations. (pp. 643, 644.)

**LIMITATION OF ACTIONS—Foreign Corporations.**—A corporation, though created by the laws of another state, is deemed to be present in the state where it is continuously doing business, and with whose laws it has complied, and it is entitled to the protection of the statute of limitations of such state, if it has an agent there and is amenable to personal service of the process of the courts of that state. (p. 645.)

**LIMITATION OF ACTIONS—Foreclosure Proceedings—Absence from State.**—The absence of the mortgagor from the state after he has parted with the title to the mortgaged property does not prevent the statute of limitations from running in favor of his grantee. (pp. 646, 647.)

**LIMITATION OF ACTIONS—Foreclosure of Mortgage.**—An action to foreclose a real estate mortgage is a remedy distinct from remedies by which the creditor may enforce the personal obligation for the mortgage debt, and the foreclosure action and the right thereto may become barred by limitation, even though the mortgage debt is not so barred. (p. 649.)

**LIMITATION OF ACTIONS—Right of Mortgagor's Grantee Plead on Foreclosure.**—The grantee of a mortgagor may avail himself of the plea of the statute of limitations as a defense to an action to foreclose the mortgage, although the debt is neither discharged nor barred as against the original mortgagor. (pp. 655, 656.)

Ball, Watson & Maclay, for the appellant.

Newman, Spaulding & Stambaugh, for the respondent.

<sup>151</sup> ENGERUD, J. This is an action to foreclose a mortgage upon one hundred and sixty acres of land situated in Dickey county. The mortgage was executed on May 16, 1883, and recorded on June 11, 1883. It was given by Fred West,

who was then the owner of the land, to secure his note for three hundred and thirty-five dollars of even date. The note became due November 1, 1888. No payments have been made upon it. In the fall of 1887 West moved from the territory of Dakota, and has since been absent from this jurisdiction. In December, 1887, after leaving the territory, he conveyed the land to E. S. Brown, receiver of the Northwestern Manufacturing and Car Company, a Minnesota corporation. On February 1, 1888, Brown conveyed to the Minnesota Thresher Manufacturing Company, also a Minnesota corporation. Both deeds expressly except the plaintiff's mortgage from the covenants of warranty. On August 7, 1901, the last-named grantee conveyed to R. H. Bronson, who had been appointed receiver for said corporation, and on August 9, 1901, the latter conveyed to the Northwest Thresher Company, a Minnesota corporation, the defendant in the present action. These several corporations had complied with the laws of the territory and state, and were at all times amenable to suit in this jurisdiction. The mortgagor and debtor is not made a party to this action. The only relief sought is a decree for the foreclosure of the mortgage and the sale of the mortgaged premises to satisfy the debt. The defendant interposed as its sole defense the statute of limitations. This defense was overruled by the trial court, and judgment was rendered as prayed for in the complaint. The defendant has appealed from the judgment, and demands a review of the entire case in this court, under section 5630 of the Revised Codes of 1899.

The only question involved upon this appeal is whether the statute of limitations is available to this appellant as a defense against <sup>152</sup> the plaintiff's action. The time within which an action to foreclose a mortgage of real property must be commenced in this state is limited to ten years from the time the cause of action accrued: Rev. Codes 1899, secs. 5199, 5200. If, when a cause of action shall accrue against any person, he shall be out of the state, the statute does not begin to run until his return into the state: Rev. Codes 1899, sec. 5210.

Appellant first contends that this action is one in rem against the mortgaged property, and hence that the several objections which will be hereafter noticed, urged against the defense of the statute on the ground that the person against whom the cause of action accrued was absent from the state, have no application. We are agreed that this is not an ac-

tion in rem, but an action in personam. Our views on this subject are fully and clearly expressed by Judge Mitchell in *Bardwell v. Collins*, 44 Minn. 97, 20 Am. St. Rep. 547, 46 N. W. 315, 9 L. R. A. 152: "It is not an action in rem, but an action in personam. It is true, it has for its object certain specific real property against which it is sought to enforce the lien of the mortgage, and in that sense it partakes somewhat of the nature of a proceeding in rem, but not differently, or in any other sense, than do actions in ejectment, replevin, for specific performance of a contract to convey, to determine adverse claims to real estate and the like. The rights and equities of all parties interested in the mortgaged premises are to be adjusted in the action, which proceeds not against the property, but against the persons; and the judgment binds only those who are parties to the suit and those in privity with them: *Whalley v. Eldridge*, 24 Minn. 358. Next, it is not only an action in personam, but is also strictly judicial in its character, proceeding according to due course of common law, like any other action cognizable in courts of equity or common law." We are all, therefore, of the opinion that the absence from the state of the person against whom the cause of action accrued stays the running of the statute of limitations against an action to foreclose a mortgage, the same as in any other action in personam.

The mortgage debt was due November 1, 1888, and the present cause of action, therefore, accrued not later than November 2, 1888. At that time the mortgaged premises were owned by the Minnesota Thresher Company, and such ownership continued until 1901. That company was a foreign corporation organized and existing under the laws of Minnesota. It was stipulated to be a fact, <sup>153</sup> however, that said corporation during all that time was doing business here; that during all the time mentioned it had a resident agent authorized to accept service of process, and had in all respects complied with the laws of the territory, and subsequently those of the state, relating to foreign corporations doing business here. It was further stipulated to be a fact that the appellant Northwest Thresher Company was organized in June 1901, under the laws of Minnesota, as the successor of the Minnesota Thresher Company, for the purpose of taking and absorbing the property, assets and business of the old company, and that the new company has continued to do business



ness in this jurisdiction, and has complied with all the conditions imposed by law upon foreign corporations doing business in this state. The respondent contends that the statute does not run in favor of a foreign corporation, even though it has been continuously doing business in this state, and though it could at all times have been personally served with process within this jurisdiction. The weight of authority is against respondent's contention: *Huss v. Central R. & B. Co.*, 66 Ala. 472; *Lawrence v. Ballou*, 50 Cal. 258; *King v. National M. & E. Co.*, 4 Mont. 1, 1 Pac. 727; *Wall v. Chicago & N. W. Ry. Co.*, 69 Iowa, 498, 29 N. E. 427; *Connecticut Mut. Life Ins. Co. v. Duerson's Exr.*, 28 Gratt, 630; *Turcott v. Yazoo etc. Ry. Co.*, 101 Tenn. 102, 70 Am. St. Rep. 661, 45 S. W. 1067, 40 L. R. A. 768; *City of St. Paul v. Chicago & M. Ry. Co.*, 45 Minn. 387, 48 N. W. 17; *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364; *Abell v. Penn Mut. Life Ins. Co.*, 18 W. Va. 400. The courts of New York, Wisconsin and Nevada hold that a foreign corporation is incapable of being present in a state other than that under whose laws it exists, and hence, under all circumstances, a foreign corporation is absent from all other states than that of its domicile. Consequently, those courts hold that a foreign corporation comes within that provision of the statute of limitations which excepts absentees from its operation: *Olcott v. Tioga Ry. Co.*, 20 N. Y. 210, 75 Am. Dec. 393; *Rathbun v. Northern Cent. Ry. Co.*, 50 N. Y. 656; *Larson v. Aultman & Taylor Co.*, 86 Wis. 281, 39 Am. St. Rep. 893, 56 N. W. 915; *Travelers' Ins. Co. v. Fricke*, 99 Wis. 367, 74 N. W. 372, 78 N. W. 407, 41 L. R. A. 557; *State v. National Sec. Society*, 103 Wis. 208, 79 N. W. 220; *Robinson v. Imperial etc. Co.*, 5 Nev. 44. In our opinion, the rule adopted by the majority of the courts is the sound one—that a corporation, although created by the laws of another state, should be deemed to be present in the state, and entitled to the protection of the statute of limitations, if it has been regularly engaged in doing business in this state, and has had <sup>154</sup> its agent or agents here, and been amenable to personal service of the process of our courts.

It is urged, however, by respondent, that the decision in *Olcott v. Tioga Ry. Co.*, 20 N. Y. 210, 75 Am. Dec. 393, is conclusive upon us, because our statute of limitations, including the provision which now appears as section 5210 of the Revised Codes of 1899, was borrowed from New York, and

adopted in this state after the decision in *Olcott v. Tioga Ry. Co.*, 20 N. Y. 210, 75 Am. Dec. 393, was rendered, and hence it must be presumed that the act was adopted with the interpretation placed upon it by the courts of the state from which it was borrowed. The rule invoked is a familiar one often recognized by this court, but we do not think it has any application in this case. The defendant in that case was a Pennsylvania corporation, and had not been amenable to process in New York the full six years required to bar the action. It was asserted in its behalf, however, that the provisions which excepted from the operation of the statute persons absent from the state applied only to natural persons; and it was argued, therefore, that a foreign corporation could successfully plead the limitation statute of New York in bar of an action against it in that state, even though it had been beyond the reach of process from the courts of that state the entire six years. The court held that a corporation was a "person" within the meaning of the law, and that, if it had not been subject to the process of the courts of the state, it could not invoke the statute of limitations. Whatever else was said in that case was obiter dicta.

The question whether a corporation can or cannot be present in any state other than that under whose laws it was organized is a question rather of general law than of interpretation of this statute. It is a question we should feel at liberty to decide for ourselves, even if the rule counsel invokes were an inflexible one. We hold, therefore, that the statute of limitations has run in favor of this defendant and its predecessor, the Minnesota Thresher Company, if the latter was the person against whom the cause of action accrued.

This brings us to the question upon which the members of this court are unable to agree: Did the absence from the state of the mortgagor and debtor, West, prevent the running of the statute against this suit to foreclose the mortgage? The courts of Illinois, Texas, Kansas and Iowa hold that the debtor's absence, even though he has parted with the title to the mortgaged premises, tolls the <sup>155</sup> statute. In California, Washington, Oregon, Nebraska, Missouri, New York and South Carolina the contrary has been held. The majority of the court has reached the conclusion that the absence of West did not toll the statute. Our attention has been called to the following cases from Illinois: *Emory v. Keighan*, 94 Ill.

543; *Schifferstein v. Allison*, 24 Ill. App. 294, 123 Ill. 662, 15 N. E. 275; *Hibernia Banking Assn. v. Commercial Nat. Bank*, 157 Ill. 524, 41 N. E. 919; *Jones v. Foster*, 175 Ill. 459, 51 N. E. 862; *Richey v. Sinclair*, 167 Ill. 184, 47 N. E. 364. Analysis will show that none of these cases are authority in this jurisdiction. In *Emory v. Keighan*, 94 Ill. 543, *Hibernia Banking Assn. v. Commercial Nat. Bank*, 157 Ill. 524, 41 N. E. 919, and *Jones v. Foster*, 175 Ill. 459, 51 N. E. 826, the facts were that the owner of the equity of redemption had been absent from the state; and in *Schifferstein v. Allison*, 24 Ill. App. 294, 123 Ill. 662, 15 N. E. 275, a partial payment had been made within the statutory period by the owner of the fee. In *Richey v. Sinclair*, 167 Ill. 184, 47 N. E. 364, however, the mortgagor had been absent from the state after he had parted with the title, and it was held that his absence prevented the statute from running in favor of his grantee. The reasoning in the last case cited, as well as in the others from that state, is based upon two propositions, which will be found most clearly set forth in *Pollock v. Maison*, 41 Ill. 516: 1. A mortgage was there regarded as a conveyance of an estate in land, defeasible only by the extinguishment of the debt; 2. The statute of limitations was regarded as creating a presumption of payment or release of the debt by lapse of time, and hence the neglect of the creditor to commence an action to recover his debt within the statutory period was presumptive evidence that the debt was extinguished. It followed as a necessary consequence that, if the debt was extinguished, the mortgagee's estate was likewise extinguished, and, conversely, if the debt was not extinguished, the mortgagee's title was not defeated. As to whether the later rulings in Illinois are sound in principle, in view of the changes made by the legislature of that state in the limitation laws since the decision in *Pollock v. Maison*, 41 Ill. 516, we venture no opinion: See, however, *Tate v. Hawkins*, 81 Ky. 577, 50 Am. Rep. 181. It is manifest that the decisions from Illinois proceed upon a theory that is untenable in this state. Here, under the express provisions of our Civil Code, a mortgage is a mere lien, and conveys no estate in the land: Rev. Codes 1899, sec. 4699; *Halloran v. Holmes*, 13 N. Dak. 411, 101 N. W. 310. The statute of limitations of this state does not create presumptions or extinguish obligations. It merely bars the remedy upon which it

operates, if <sup>156</sup> the defendant elects to avail himself of the statutory defense by answer: *Satterlund v. Beal*, 12 N. Dak. 122, 95 N. W. 518; *Wood on Limitations*, sec. 5; *Fowler v. Wood*, 78 Hun, 304, 28 N. Y. Supp. 976, affirmed 150 N. Y. 584, 44 N. E. 1124. In Oregon and Nebraska it was held that the absence of the mortgagor did not toll the statute, because the action to foreclose was an action in rem: *Anderson v. Baxter*, 4 Or. 105; *Peters v. Dunnels*, 5 Neb. 460. We cannot follow these cases, because we hold that this action is not in rem. The decisions from Texas, Kansas and Iowa are in point, but, in our opinion, those decisions rest on propositions which are as unsound in principle as they are opposed to precedent. They lead to absurd and unjust results, and thwart the object sought to be obtained by the statute, instead of promoting that object and furthering justice. Cases fairly representing the views of the Texas courts are *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. Rep. 408, 27 L. ed. 682; *Falwell v. Henning*, 78 Tex. 278, 14 S. W. 613. From Kansas may be cited *Waterson v. Kirkwood*, 17 Kan. 9, and *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; and from Iowa, *Clinton Co. v. Cox*, 37 Iowa, 570, *Brown v. Rockhold*, 49 Iowa, 282, *Robertson v. Stuhlmiller*, 93 Iowa. 326, 61 N. W. 986, and *Leeds Lumber Co. v. Haworth*, 98 Iowa, 463, 60 Am. St. Rep. 199, 67 N. W. 383.

The rule adopted by these several courts seems to have been based upon the same reasons. Those reasons are tersely stated in *Clinton County v. Cox*, 37 Iowa, 570, as follows: "Under the laws of this state a mortgage conveys no interest in or title to lands, but is simply a lien thereon for the purpose of securing the indebtedness which is its foundation. It is an incident—a security in the nature of a lien—of the debt. It survives until the debt be paid or discharged, or the mortgage is released. It is a convoy bearing a lien for the protection of the debt, and as long as that exists it is not relieved of the duty of protection, or rendered ineffective for that purpose. When the debt is discharged, or, by operation of law, may no longer be enforced, its functions terminate, and not before." In that case, as in the others cited, it was held that the absence of the debtor after he had parted with the title prevented the statute from running in favor of his grantee against a suit to foreclose. It is clear that a part payment by the mortgagor after the conveyance would have

had the same effect, because, under the rule which these cases announce, any act which prevents <sup>157</sup> the statute from running in favor of the debtor has the like effect on the mortgage, whether the debtor has any interest in the mortgaged premises or not.

It will be observed that the fundamental proposition upon which the reasoning is based which has led to the conclusions reached by the courts of Iowa, Kansas and Texas is this (quoting from *Clinton Co. v. Cox*, 37 Iowa, 570): "It [the mortgage] is an incident . . . of the debt. It survives until the debt be paid or discharged, or the mortgage is released. . . . When the debt is discharged, or by operation of law may no longer be enforced, its functions terminate, and not before." The fallacy in this proposition is patent. It is true that the mortgage is a mere incident to the debt—"a convoy bearing a lien for the protection of the debt." It is also true that the extinguishment of the debt also extinguishes the mortgage. It is not true, however, that when the personal liability for the debt is no longer enforceable by reason of the statute of limitations, the functions of the mortgage terminate. It is not true, because the fact that the statutory defense is available to the debtor does not extinguish the debt. It merely bars the remedy to enforce the personal liability, and leaves the debt in existence. Consequently, so long as the debt is not extinguished, the mortgage exists, and is enforceable until the remedies to enforce the lien are also barred by the lapse of time within which the statutes require them to be invoked. The statute of limitations operates on the remedy only. That being the effect and operation of the statute, it follows that the remedy against the debtor on his personal liability may be barred by lapse of time and yet the remedy upon the mortgage remain available; and it is likewise apparent that the converse is true, the remedy for the enforcement of the mortgage may be barred although an action at law against the debtor is still maintainable.

The decisions in Kansas, Iowa and Texas are erroneous, because those courts have misapplied the doctrine that a mortgage is a mere incident of the debt it secures. It is true that, by reason of this relationship of the mortgage to the debt, anything that operates to extinguish the latter necessarily discharges the former, because the incident cannot survive the

principal. These courts, however, fail to distinguish between the extinguishment of the debt itself and the absence or loss of a remedy to enforce the personal liability for it. The failure to make the distinction is apparently due to the <sup>158</sup> fact that those courts have assumed, as it was expressly declared in *Schmucker v. Seibert*, 18 Kan. 104, 26 Am. Rep. 765, and in *Duty v. Graham*, 12 Tex. 427, 436, 62 Am. Dec. 534, that because the mortgage is an incident to the debt, therefore the remedy to enforce the lien was also a mere incident or part of the remedy or cause of action against the debtor to enforce his personal liability. This reasoning, and the propositions upon which it rests, are in direct conflict with the overwhelming weight of authority: *Joy v. Adams*, 26 Me. 330; *Thayer v. Mann*, 19 Pick. 535; *Richmond v. Aiken*, 25 Vt. 324; *Baldwin v. Norton*, 2 Conn. 161; *Pratt v. Huggins*, 29 Barb. 282; *Fowler v. Wood*, 78 Hun, 304, 23 N. Y. Supp. 976, affirmed in 150 N. Y. 584, 44 N. E. 1124; *Colton v. Depew*, 60 N. J. Eq. 454, 83 Am. St. Rep. 650, 46 Atl. 728; *Demuth v. Old Town Bank*, 85 Md. 315, 60 Am. St. Rep. 322, 37 Atl. 266; *Arthur v. Screven*, 39 S. C. 77, 17 S. E. 640; *Elkins v. Edwards*, 8 Ga. 325; *Bizzell v. Nix*, 60 Ala. 281, 31 Am. Rep. 38; *Browne v. Browne*, 17 Fla. 607, 35 Am. Rep. 96; *Kendall v. Clarke*, 90 Ky. 178, 13 S. W. 583; *Tate v. Hawkins*, 81 Ky. 577, 50 Am. Rep. 181; *Michigan Ins. Co. v. Brown*, 11 Mich. 265; *Wiswell v. Baxter*, 20 Wis. 680; *Whipple v. Barnes*, 21 Wis. 332; *Lewis v. Schwenn*, 93 Mo. 26, 3 Am. St. Rep. 511, 2 S. W. 391; *Bush v. White*, 85 Mo. 339; *Bank of the Metropolis v. Guttschlick*, 14 Pet. 19, 10 L. ed. 335; *Eubanks v. Leveridge*, 4 Saw. 274, Fed. Cas. No. 4544. It has been held that the two causes of action could not even be joined, in the absence of a statutory provision to that effect: *Michigan Ins. Co. v. Brown*, 11 Mich. 265; *Borden v. Gilbert*, 13 Wis. 670; *Stilwell v. Kellogg*, 14 Wis. 461; *Cary v. Wheeler*, 14 Wis. 281; *Faesi v. Goetz*, 15 Wis. 231; *Doan v. Holly*, 25 Mo. 357, 26 Mo. 186.

The doctrine established by the foregoing cases is well stated by Judge Deady in *Eubanks v. Leveridge*, 4 Saw. 274, Fed. Cas. No. 4544. The case was tried in the federal court in Oregon, and, of course, the decision of the supreme court of Oregon on the question involved was conclusive on the federal court sitting in that state. The state court had held that an action to foreclose was not barred by the absence of the

mortgagor after he parted with the title, because the action was in rem; but Judge Deady reached the same conclusions for reasons different from those of the state court. He said: "But I apprehend the true doctrine to be that the remedy upon the note and mortgage is, like the transaction itself, twofold. The making and delivery of the note, and the failure to pay the same according to its tenor, gives the holder thereof a right of action against the maker, <sup>159</sup> upon which he can obtain a personal judgment for the sum due thereon. So the execution and delivery of the mortgage creates a lien upon the property included in it to secure the payment of the sum mentioned in the note, and, in case of a default in such payment, a suit may be maintained upon this 'sealed instrument,' the mortgage, to enforce such lien for the purpose of paying the debt. Notwithstanding section 410 of the code provides that in a suit 'to foreclose a lien, when there is also a personal obligation for the payment of the debt,' in addition to the decree of foreclosure and sale, 'a decree may be given against the person giving the same for the amount thereof,' yet I apprehend that either the remedy upon the personal obligation or the mortgage may be pursued for the collection of the debt without reference to the other. . . . These authorities go to show that the holder of a note and mortgage has two distinct remedies for the collection of his debt, and that they exist and may be pursued independently of each other."

The doctrine recognized and established by these cases has been embodied in our Civil Code, and is expressed by section 4696 of the Revised Codes of 1899, which declares: "A lien is not extinguished by the mere lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." Bearing in mind the proposition established by the foregoing authorities and embodied in our Civil Code by the section just quoted, that the debt and the mortgage give rise to distinct and independent remedies, either of which may be resorted to within the time limited by the statute for each so long as the obligation secured by the mortgage is not extinguished, it seems to us the question is one of easy solution.

The remedy on the personal obligation for the debt and that on the mortgage may, and often must, be pursued against different defendants and in divers jurisdictions. The remedy

on the mortgage must be invoked in the jurisdiction where the property lies, and the time within which it must be commenced is governed by the law of that state. The only person or persons affected by that remedy are those who are interested in the property adversely to the mortgage. Those persons are the only necessary parties to such an action. It is against them that the cause of action for the foreclosure of the lien accrues. It is in their favor and for their protection that the statute operates. The acts or situation of the debtor who has no interest in the land clearly should not toll the <sup>100</sup> statute in an action to which he is not a necessary party. It is clear that it is only he in whose favor and for whose protection the statute operates who can waive or deprive himself of its benefits. Such is the reasoning of the courts of California, Washington, New York, Missouri and South Carolina, and we think those decisions are in accord with both law and common sense: *Wood v. Goodfellow*, 43 Cal. 185; *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91; *George v. Butler*, 26 Wash. 456, 90 Am. St. Rep. 756, 67 Pac. 263, 57 L. R. A. 396; *Denny v. Palmer*, 26 Wash. 469, 90 Am. St. Rep. 766, 67 Pac. 268; *Bush v. White*, 85 Mo. 339; *Arthur v. Screven*, 39 S. C. 77, 17 S. E. 640; *Fowler v. Wood*, 78 Hun, 304, 28 N. Y. Supp. 976, affirmed in 150 N. Y. 584, 44 N. E. 1124. See, also, *Tate v. Hawkins*, 81 Ky. 577, 50 Am. Rep. 181.

Our attention has been called to Professor Pomeroy's definition of the term "cause of action" in section 452 et seq. of Pomeroy's Code Remedies, where that author deals with the subject of joinder of causes of action under the code. It is claimed that the definition there given by Professor Pomeroy of the term "cause of action" is the only accurate definition of that term, and that it is universal in its application. However interesting a discussion of that subject may be from an academic standpoint, it is unnecessary to indulge in such a discussion in solving the problem presented in this case. The view we take of the question before us does not make it necessary to question or criticise Professor Pomeroy's definition. It is not the cause of action that is barred by the statute of limitations; it is the remedy for the cause of action that is taken away. This is plainly recognized, and even well illustrated, by some of Professor Pomeroy's illustrations in section 454 of the work referred to. A contract to convey lands, and defendant's breach, constitute a "cause of action." The



single cause of action gives rise to two remedies or actions: First, an action for damages; second, a suit for specific performance. Now, suppose the former were barred in six years and the latter in ten years, it is plain to be seen that the plaintiff having such "cause of action" might be deprived of his action for damages by lapse of time and still maintain specific performance. In other words, the single cause of action gave rise to the right to two remedies or actions; one remedy is barred, but the other remains. The same is true of a mortgage. The nonpayment of the debt is a single cause of action in the sense that term is used by Professor Pomeroy, but it gives rise to two remedies: First, an action <sup>181</sup> at law to recover the debt; and, second, a suit in equity to foreclose the mortgage. The former remedy is barred in six years, and the latter is not barred until ten years. It is not claimed by Professor Pomeroy that the proposition stated by Judge Deady in *Eubank v. Leveridge*, 4 Saw. 274, Fed. Cas. No. 4544, and the other cases cited in that connection, is not true; nor does the argument of Professor Pomeroy in any way conflict with the reasoning and the proposition in that case. It may be true that the term "cause of action" is improperly used in this connection by the judges who wrote the opinions in all the cases cited above, but the idea those cases convey to a practical mind is that the nonpayment of the debt gives rise to two distinct causes of action—an action on the debt, and a suit to foreclose. These cases also serve to show that the term "cause of action" is commonly used in a sense different from that attached to it by Professor Pomeroy, the technical accuracy of which we do not care to question.

Section 5106 of the Revised Codes of 1899 directs that "words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears." And section 5151 of the Revised Codes of 1899 directs that "words and phrases are to be construed according to the context and approved usage of the language; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition." Section 5147 of the Revised Codes of 1899 provides that "the provisions of the Code of Civil Procedure and all proceedings under it are to be liberally construed with a view to effect its objects and pro-

mote justice." We think that the term "cause of action" as used in the statute of limitations is used, not in the technical sense that Professor Pomeroy uses it, but the statute uses it in the popular sense of the right to maintain the particular action against which the statute is invoked. It is a matter of common knowledge that such is the common meaning of the term, and that fact is well illustrated by the use of that term in the numerous decisions we have cited. This interpretation of the term serves to promote the object of the statute and further justice and conforms to the requirement "words should be construed in their ordinary sense." Attaching the ordinary meaning to the term "cause of action," it is clear that a cause of action accrues, within the meaning of the statute of limitations, when the holder thereof first obtains the right of resort <sup>162</sup> to that particular form of action for relief: *Ganser v. Ganser*, 83 Minn. 199, 85 Am. St. Rep. 461, 86 N. W. 18.

The question, then, is, Against whom did the right of foreclosure accrue? There can be only one answer to that question. It accrued against the person or persons who were interested in the land adversely to the mortgage. These are the only necessary parties defendant. It is their right or title which it is the object of the suit to extinguish by means of a judicial sale, to the end that the proceeds of such sale may be applied to the satisfaction of the debt: *Jones on Mortgages*, 6th ed., sec. 1394 et seq. It is entirely immaterial whether that person happens to be the mortgagor and debtor, or some third person holding title subject to the mortgage. In either case the obligation created by the mortgage that the debt shall be paid from a sale of the land in a judicial proceeding is equally binding on the fee owner. The mortgage was a contract with the owner of the fee to the effect that, if the debt was not paid at maturity, then the debt could be collected out of the land by an action against any person who might subsequently become the owner. It was not a contract that the mortgagor would pay, or that he would sell the land and pay, but it was a contract that the land should pay. It was an obligation which became fastened upon the land itself, and was enforceable against any person who might subsequently become the owner. Consequently, the failure of the personal debtor to pay at maturity gave the mortgagee a right to maintain an action to enforce the obligation which the mortgage

fastened on the land. It manifestly does not lie in his mouth to say that he was not bound to know against whom to commence the action. He had no right to assume that the mortgagor would forever continue to be the owner of the land. The mortgage gave him no assurance on that subject. The statute was notice to the mortgagee that every day's delay in enforcing the mortgage brought him so much nearer to the time when his remedy would be gone. In short, the instant the right to enforce the mortgage arose, that instant the mortgagee was put on inquiry to ascertain against whom the action to enforce it must be brought. It is incorrect to say that this reasoning foists a new contract on the mortgagee without his consent. As stated before, his contract in the mortgage was that the land should be answerable for the debt if the personal debtor failed to pay, but the mortgagor did not agree to continue his ownership of the land nor to personally sell the land. He merely <sup>163</sup> gave the mortgagee a remedy for the collection of the debt from the land by an action to be brought against whomsoever might be the owner when the remedy became available. And the mortgagee's neglect to avail himself of that remedy within the time fixed by the statute is a good defense to the action. Such is the plain language and manifest intent of the statute: *Fowler v. Wood*, 78 Hun, 304, 28 N. Y. Supp. 976, affirmed in 150 N. Y. 584, 44 N. E. 1124. It is also just as clear that it is the intent of the statute that the remedy shall not be barred by the lapse of time in favor of a necessary party defendant who is not within the reach of process, so he can be personally served. Yet the Kansas cases lead to the result that, although the owner of the fee is a necessary party, yet his absence from the state does not toll the statute: *Hogaboom v. Flower*, 67 Kan. 41, 72 Pac. 547.

One more point remains to be noticed. Respondent contends that on the facts of this case it must be presumed that the amount of the mortgage debt was retained by West's grantee from the purchase price for the purpose of satisfying the mortgage, and that the land thereby became the primary fund for the payment of the debt; that the land stood charged with a trust in the hands of West's immediate and remote grantees, including this appellant, for the payment out of the land of the mortgage debt; that this trust was one for the protection of West as well as the plaintiff;

and, inasmuch as West is still liable for the debt, and could not plead the statute as a defense in this state, therefore the plea of statute of limitations by this defendant ought not in equity to be permitted. To sustain this contention, the court would have to assume the power to ignore the statute of limitations because in its opinion equity requires it. There are only two things which could stay the running of the statute against this action: Absence of the defendant, or an acknowledgment or new promise within ten years, which new promise or acknowledgment can be proved only by a partial payment or written evidence. In this case neither of these are present, and the court has no power to recognize any exceptions to the statute other than those which the legislature has made: *Teigen v. Drake*, 13 N. Dak. 502, 101 N. W. 893. The plaintiff's cause of action accrued in November, 1888, against the Minnesota Thresher Company, and became barred in November, 1898, before this defendant acquired the land.

The judgment is reversed, and the district court is directed to enter judgment in favor of the appellant and against the respondent <sup>104</sup> for the dismissal of the action and for the taxable costs and disbursements.

**Mr. Justice Young Delivered a Dissenting Opinion**, the material parts of which are as follows:

"The action is to foreclose a real estate mortgage securing the mortgagor's note, which matured November 1, 1888. The mortgagor has been absent from the territory and state since 1887. In that year, and before the note was due, he conveyed the mortgaged premises, subject to the plaintiff's mortgage. In 1901 it was conveyed to defendant, likewise subject to the plaintiff's mortgage. This action was commenced in 1903. The cause of action accrued on November 1, 1888, when the mortgagor made default in meeting his obligation. His default gave the party to whom the obligation was due two remedies for its enforcement: 1. An action at law to recover from the personal assets of the debtor; or 2. An action in equity to enforce payment by a sale of the mortgaged premises, and through a deficiency judgment against the debtor, if the land proved insufficient to discharge the obligation: Rev. Codes 1899, sec. 5865. The legislature has placed different and definite periods of limitation upon these remedies. The action at law is limited to six years, the foreclosure action is limited to ten years, from the time when the cause of action as to which the remedy is sought accrued. The legislature has also provided for an extension of these periods. The defendant, a foreign corporation, whose title was received subject to the plaintiff's mortgage, and but two years prior to the commence-

ment of this action, pleads, as its sole defense, the statute of limitations. It will be noted that sufficient time has elapsed since the cause of action accrued against the mortgagor, which was November 1, 1888, to bar both remedies, unless it has been extended by the mortgagor's absence. If the statute was tolled by his absence the action is not barred. The case turns entirely upon section 5210 of the Revised Codes of 1899, which, so far as material, reads as follows: 'If, when the cause of action shall accrue against any person, he shall be out of the state, such action may be commenced within the terms herein respectively limited after the return of such person into the state.' Some courts have treated foreclosure actions as in rem, and the cause of action as one against the land. From this assumption the conclusion is logical and necessary that the mortgagor's absence does not extend the period of foreclosure; for it is only when the cause of action is against a person, and the person against whom it accrues is absent, that the statute declares that the period is extended. The cases holding that the action is in rem represent the minority view. *Anderson v. Baxter*, 4 Or. 105, and the decision of Judge Deady, of the federal district court, in *Eubanks v. Leveridge*, 4 Saw. 274, Fed. Cas. No. 4544, an Oregon case in which he followed the conclusion in the case just cited, and *Peters v. Dannels*, 5 Neb. 460, are of this class. The decided weight of authority is the other way. As stated in the majority opinion, 'we are agreed that this action is not in rem,' and 'we are of the opinion that the absence from the state of a person against whom the cause of action accrued stays the running of the statute of limitations against an action to foreclose a mortgage, the same as in any other action in personam.' In other words, section 5210, *supra*, which extends the time for commencing an action when the person against whom the cause of action accrues is absent from the state applies to this action.

"It is apparent, then, that the decisive question is this, Against whom did the cause of action in this case accrue? For it is the fact of the absence of the person against whom 'the cause of action shall accrue' which this statute declares shall extend the period for commencing the action. It is in answering this question that I am compelled to part company with my associates. My answer is that it is the absence of the obligor, Fred West, the person who executed the note and mortgage, the person whose obligation this action is brought to enforce, and the only person who, upon this record, owes any obligation, contractual or otherwise, to the plaintiff. In my view, the question involves no difficulty, and, if it were not for the views of my associates, I would not consider it fairly debatable. There is no controversy as to the facts, and there is no ambiguity in the language of the statute, and no obscurity or uncertainty as to the meaning of the phrase 'cause of action.' The statute makes the general declaration applicable to all actions that the absence of

the person against whom the 'cause of action shall accrue' shall extend the period for commencing the action. This declaration, applied in the light of the legal meaning of the phrase 'cause of action'—and I do not understand that it has any other meaning—will designate with certainty in every action the persons whose absence tolls the statute, i. e., the debtor or person whose obligation is being enforced. The phrase 'cause of action' was coined early in the history of English jurisprudence. It is a phrase peculiar to the language of the law and the courts. It was employed in the acts of parliament from an early day (see statute 21 James I, c. 16, entitled 'An act for the limitation of action,' etc.), and it has been a familiar phrase in the statutes of this country from its earliest history. While it is true the language of the courts and text-writers in defining it has not always been uniform, yet it may be safely stated that in every instance in which its elements were under discussion it has been held to include as one of its essential and constituent elements an obligation, or legal duty, an obligation or duty resting upon the person against whom the cause of action exists. The cause of action accrues in favor of the person to whom the obligation or duty is due, and it accrues against the person who owes the obligation or duty, and arises upon the latter's default. The following analysis by Professor Pomeroy in his Code Remedies, section 453, has been generally approved by the courts and text-writers, and, so far as I know, as to its essential elements it has never been criticised: 'Every judicial action must involve the following elements: A primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consists in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting upon the defendant, springing from this delict; and finally, the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the codes of the several states. They are the legal cause or foundation whence the right of action springs.' Section 459: 'The different reliefs which the plaintiff seeks to obtain do not constitute different causes of action.' Other courts and text-writers have defined it as follows: *Veeder v. Baker*, 83 N. Y. 156: 'It may be said to be composed of the right of the plaintiff, and the obligation, duty or wrong of the defendant, and these combined, it is sufficiently accurate to say, constitute the cause of action.' *Wildman v. Wildman*, 70 Conn. 700, 41 Atl. 1; *Goodrich v. Alfred*, 72 Conn. 257, 43 Atl. 1041: 'Stated in brief, a cause of action may be said to consist of a right belonging to the plaintiff, and some wrong or omission done by the defendant by which that right has been violated.' *Kennerty v. Etiwan P. Co.*, 21 S. C. 226, 53 Am. Rep. 669: 'A cause of action,

defined in a few words, is a primary right of one, either legal or equitable, invaded by another.' Dicey on Parties to Actions, p. 8: 'A cause of action, i. e., a right on the part of one person, combined with a violation of or infringement upon such right by another.' Maxwell on Code Pleading, 97: '(1) A primary right of plaintiff, and a wrong done by defendant in respect to such right.' Phillips on Code Pleading, sec. 32: 'A primary right and its corresponding duties, and (2) the infringement of this right by a party owing this duty.' See, also, sections 29 to 33, inclusive. 1 Estee's Pleadings, sec. 128: 'A right on the part of one person, the plaintiff, combined with a violation or infringement of that right by another person, the defendant.' 2 Words and Phrases, 1115: 'A cause of action may be said to consist of the right belonging to the plaintiff and some wrongful act or omission done by the defendant by which that right has been violated.' Note numerous cases cited. Emory v. Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730: 'Causes of action are very often confounded with remedies, and, being regarded as synonymous, the rules established with reference to the one are sometimes supposed to be applicable to the other. This, however, is a mistaken view of the subject, as a brief investigation will show. A cause of action may be defined in general terms to be a legal right, invaded without justification or sufficient excuse. Upon such invasion a cause of action arises, which entitles the party injured to some relief by the application of such remedies as the laws may afford. But the cause of action and the remedy sought are entirely different matters. The one precedes, and, it is true, gives rise to the other, but they are separate and distinct from each other, and are governed by different rules and principles': See, also, Andrews' American Law, secs. 1063, 1064; Armes Co. v. Railway Co., 7 Yale Law Rev. 245, also found on page 1153, Appendix Andrews' American Law; Frost v. Witter, 132 Cal. 421, 84 Am. St. Rep. 53, 64 Pac. 705; Fields v. Daisy Gold Min. Co., 26 Utah, 373, 73 Pac. 521; Swedish-American Nat. Bank v. Dickinson Co., 6 N. Dak. 222, 69 N. W. 455, 49 L. R. A. 285; Von Campe v. City of Chicago, 140 Ill. 361, 29 N. E. 892. It is manifest that the cause of action which gave rise to the remedy now being invoked accrued against Webb, the debtor and mortgagor, and against no one else. It was his debt, and it is secured by his mortgage. He alone executed the mortgage, and it was upon his own property. No one else has agreed to pay the debt; no one else signed the mortgage; no one else has assumed any contractual relations with the plaintiff either as to the note or mortgage. It was his default, and his alone, which gave rise to the plaintiff's cause of action. The several grantees took their title with constructive notice of the mortgage and expressly subject to it. They did not obligate themselves to pay the debt. They therefore owed the plaintiff no duty. They have made no default, and as between them and the plaintiff there has been no concurrence of right,

duty and default which would give rise to a cause of action against them. Had they assumed the mortgage and agreed to pay the debt, or had they given the mortgage upon their own property to secure West's debt, a cause of action would have arisen against them in plaintiff's favor, and the statute would, as to that cause of action, run in their favor as to all remedies to enforce it: *Daniels v. Johnson*, 129 Cal. 419, 79 Am. St. Rep. 123, 61 Pac. 1107; *Farmers' Nat. Bank v. Gates*, 33 Or. 388, 72 Am. St. Rep. 724, 54 Pac. 205; *Fowler v. Wood*, 78 Hun, 304, 28 N. Y. Supp. 976. But we have no such case here. The grantees have assumed no liability, and have made no default. The remedy invoked against the defendant is upon the cause of action against the mortgagor and debtor upon his debt, and his mortgage, and rests upon his default, and not upon any default of his grantee. The 'cause of action' accrued against him. He has been absent from the state. The statute declares that in that event the time for commencing the action is extended. This action was therefore brought within the statutory period. This conclusion, to my mind, cannot be avoided if the statute be given effect. The majority opinion does not meet the question with directness, if at all: and I am therefore in some doubt as to the exact ground upon which they really rest their conclusion. If they mean that 'the cause of action' does in fact accrue against a grantee who takes expressly subject to the mortgage, I disagree with them as to the fact. If they mean that the period of time for commencing an action depends upon the presence or absence of 'parties,' I answer that the statute does not so provide, for it only extends the period upon the absence of the obligor or obligors—the person or persons against whom 'the cause of action accrues.' In some instances the necessary party or parties defendant may be the same person or persons whose obligation is being enforced. In this case that is not true, and this is frequently the case in equity actions, especially in foreclosure actions in which subsequent purchasers and encumbrancers are made defendants. So far as this conclusion is based upon the ground that the phrase 'cause of action' has a different and 'popular' meaning, and that the 'popular' meaning should be ascribed to it so that the statute may include 'necessary parties' instead of merely obligors, it rests, as has been previously pointed out, upon an unwarranted assumption. This is the first instance in which this statute has been before this court. Neither this court nor any other court, so far as I can learn, has ever held that the phrase 'cause of action' as used in this statute has any other than its legal meaning, and I cannot assent to its amendment by judicial construction. Neither do I agree that courts can avoid giving effect to a statute which is written in plain terms upon the ground that it would be in 'furtherance of justice' to do so. The legislature having declared the law, it is our duty to apply it as it is written.



"The majority hold that the action to foreclose the mortgage is barred. In defense of this conclusion they state, and it is a correct statement, for the statute so provides, 'that the remedy against the debtor on his personal liability may be barred by lapse of time and yet the remedy upon the mortgage remain available.' Following this, they state that 'it is likewise apparent that the converse is true—the remedy for the enforcement of the mortgage may be barred though the action at law against the debtor is still maintainable.' The converse is not true in this state, for the legislature has fixed a longer period for commencing the foreclosure action than for the action at law. The statement is specious, but unsound. If the legislature had fixed the same period for both actions, the bar would fall as to both at the same time. If it had reversed the periods and fixed six years for the foreclosure action and ten years for the action at law, the remedy by foreclosure would of course be lost before the action at law was barred. But this is not our statute. On the contrary, it preserves the remedy by foreclosure for ten years and the remedy at law for only six years. In short, the statute itself preserves the remedy by foreclosure after the action at law is barred, which is directly contrary to the conclusions reached by my associates. It is true, a number of courts have held that the absence of the mortgagor from the state will not extend the period for commencing a foreclosure action as against a resident grantee, but I am free to confess that I am unable to find in the opinions in these cases any satisfactory reason for that conclusion. They will be found to rest either upon an erroneous assumption of fact, or upon the courts' views as to what the law ought to be. The reasons advanced are noted for their lack of harmony, and it is evident that they do not appeal to my associates, for they apparently are unwilling to rest their conclusion upon the grounds stated by any court which reached a like result. It will be found upon an examination of these cases that the grounds stated by the majority in this case are in some respects without precedent. This is particularly true as to the new meaning ascribed to the phrase 'cause of action.'

"In the following cases a statute like our own was applied to foreclosure actions, and the question under consideration was directly involved. In *Waterson v. Kirkwood*, 17 Kan. 9, the grantees of one Pearsoll, the absent mortgagor, pleaded the statute of limitations. Their plea was overruled. The court said: 'They have merely succeeded to the rights of Pearsoll; they stand in his shoes; they have nothing more than he at any time had the right to transfer them. The stream has not and cannot rise higher than the fountain, nor can they, by the purchase of Pearsoll's interest in the land, cast additional burdens and inconvenience upon the holder of the mortgage. And therefore, as Pearsoll had never obtained or had the right to plead the statute of limitations, the grantees . . . have

no such right': See, also, opinion of Judge Brewer in *Schmucker v. Seibert*, 18 Kan. 104, 26 Am. Rep. 765. In *Clinton County v. Cox*, 37 Iowa, 570, the plea of the resident grantee of one Cox, the absent mortgagor, was overruled, against the contention which is made in this case—that because the action could have been brought before the ten-year period expired, notwithstanding the mortgagor's absence, the action was therefore barred—with the cogent statement that 'the law does not so provide.' This conclusion was again announced in *Robertson v. Stuhlmiller*, 93 Iowa, 326, 61 N. W. 986, upon a like state of facts. The court said: 'The obligation to Stuhlmiller [the mortgagor] is valid, and the lien of the mortgage is still in force. . . . The interest of the grantee is junior to the lien of the mortgage, . . . because the title he acquired is subject to the mortgage.' These decisions were rendered by a united court, and this was true in *Leeds Lumber Co. v. Haworth*, 98 Iowa, 463, 60 Am. St. Rep. 199, 67 N. W. 383, in which the same court held that 'an action to foreclose a mechanic's lien which was not barred by limitation against the principal debtor because of his removal from the state before the statute had fully run was not barred as to other lienors who have been residents of the state during the entire period.' The question also arose in Minnesota in *Whaley v. Eldridge*, 24 Minn. 358. It was contended by a subsequent grantee that the statute had run notwithstanding the mortgagor's absence from the state, upon the theory that the action was in rem, and that the statutory exception for absence was not applicable; citing in support of this view *Anderson v. Baxter*, 4 Or. 105, and *Eubanks v. Leveridge*, 4 Saw. 274, Fed. Cas. No. 4544. This the court denied, and held that the time had been extended. It is true, it appears in the statement of facts prefixed to the opinion that the mortgagor's immediate grantee was also absent. That fact, however, was not adverted to in the briefs of counsel or in the opinion of the court, and plainly was not considered of any legal significance. As to the effect accorded to this decision, see *Bush v. White*, 85 Mo. 339, and 2 *Pingrey on Mortgages*, sec. 1572. The courts of Illinois, applying a statute like our own, have held against the conclusions of my associates in a series of cases. In *Hibernia Banking Assn. v. Commercial Nat. Bank*, 157 Ill. 524, 41 N. E. 919, it was argued on behalf of one who held under a sheriff's deed that, inasmuch as the mortgage might have been foreclosed notwithstanding the mortgagor's absence, no reason remained why the statutory exception for absence should apply or the time of the mortgagor's absence be deducted. This was answered in the following language: 'As the case comes within the express language of the exception, we cannot assume the province of the legislature and say that the exceptions are not to apply.' Again, in *Richey v. Sinclair*, 167 Ill. 184, 47 N. E. 364, it was held in a foreclosure action that 'the time of the mortgagor's absence from the state after the right of action accrued on the debt cannot be reckoned

as a part of the time limited for the commencement of the foreclosure proceedings against his grantee, though he is not a party to the suit'; basing its conclusions upon a previous case, *Emory v. Keighan*, 94 Ill. 543, in which it had held, in harmony with the almost unanimous voice of authority, that 'the rights of one holding under a mortgage of real estate may be affected by the fact that the payment of interest or payment of a part of the mortgage debt by the mortgagor after maturity and before the statute of limitations had run, though he may not be a party to either'; and stating that, 'upon the same principle and for a like reason, the grantee of the mortgagor will be affected by the fact that the mortgagor had gone out of the state and thus arrested the running of the statute of limitations. The holding has been uniform in this state.' This construction of the statute was also followed in *Falwell v. Hening*, 78 Tex. 278, 14 S. W. 613, in which it was held that the absence from the state of the maker of a vendor's lien suspends the statute as well against the lien as against the indebtedness, and that a purchaser from the vendee or mortgagor could not avoid the lien by limitation while the debt and lien are valid against the original vendee. See, also, *Jones v. Foster*, 175 Ill. 459, 51 N. E. 862; *Emory v. Keighan*, 94 Ill. 543, *Von Campe v. Chicago*, 140 Ill. 361, 29 N. E. 892, is to the same effect, and more to the point relied upon by my associates, in that it holds that 'grantees are not the persons against whom the cause of action accrues within the meaning of section 18' (our section 5210, *supra*). *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. Rep. 408, 28 L. ed. 682, is in point upon the principle upon which the foregoing case rests, aside from their adherence to the governing statute. That was a foreclosure action, wherein a grantee of the mortgagor, as in this action, relied upon the statute of limitations. James B. Ewell and his wife gave a note to Daggs, secured by a mortgage upon land which in equity belonged to George W. Ewell, a brother. Later, James B. Ewell transferred the land back to his brother, George, the latter having no knowledge of the existence of the mortgage. George pleaded the statute of limitations. Mr. Justice Matthews, speaking for the court, said: 'There is no force in the suggestion that, although the defense of the statute of limitations would not avail James B. Ewell, . . . it, nevertheless, is a protection to George W. Ewell, because . . . the suit now pending was not brought till after the time limited for an action to recover the debt. For the present suit is not to recover the debt, nor is it a suit against George W. Ewell. He is a party defendant, because he has an interest by a subsequent conveyance in the lands sought to be sold under the mortgage. He has an equity of redemption, which entitles him to prevent a foreclosure and sale by payment of the mortgage debt; but the debt he has to pay is not his own, but that of James B. Ewell. If he can show that debt no longer exists because it has been barred by the statute of limitations, he

is entitled to do so; but he must do it by showing that it is barred as between the parties to it. If not, the land is still subject to the pledge, because the condition has not been performed. It is not to the purpose for the appellant to show that he owes the debt no longer, for in fact he never owed it at all; but his land is subject to its payment as long as it exists as a debt against the mortgagor, for that was its condition when his title accrued.' Mr. Justice Washington in *Hughes v. Edwards*, 9 Wheat. (U. S.) 489, 6 L. ed. 142, sets forth the legal relation existing between a purchaser and the holder of a prior mortgage as to this question in the following language: 'A purchaser, with notice, can be in no better situation than the person from whom he derives the title, and is bound by the same equity which would affect his rights. The mortgagor, after forfeiture, has no title at law, and none in equity, but to redeem upon the terms of paying the debt and interest. His conveyance to a purchaser with notice passes nothing but an equity of redemption, and the latter can, no more than the mortgagor, assert that equity against the mortgagee without paying the debt, or showing that it has been paid or released, or that there are circumstances in the case sufficient to warrant the presumption of those facts, or one of them.' So, also, upon the same principle, it was held in *Murdock v. Waterman*, 145 N. Y. 55, 39 N. E. 829, 27 L. R. A. 418, that 'a partial payment by a mortgagor of the debt, even after he had conveyed the premises mortgaged, would continue the lien of the mortgage. . . . The mortgage is an incident to the debt, and, when payments are made by the debtor, the mortgagee is not called upon to inquire how the mortgagor has dealt with the equity of redemption. If the mortgage is recorded, the purchaser has constructive notice of its existence, and a dealing with the debt between the debtor and creditor in the usual course is to be expected. The mortgagors, until at least the debt is barred, represent all persons interested in the land.' This is indeed so well settled that it is now seldom questioned: See *New York Life Ins. Co. v. Covert*, 6 Abb. Pr., N. S., 154; *Kendall v. Tracey*, 64 Vt. 522, 24 Atl. 1118; *Sanger v. Nightingale*, 122 U. S. 176, 7 Sup. Ct. Rep. 1109, 30 L. ed. 1105; and *Hanchett v. Blair*, 100 Fed. 817, 41 C. C. A. 76, and cases cited on page 825 of 100 U. S., page 84 of 41 C. C. A. 'The general, if not universal, rule is that a partial payment or an acknowledgment of a debt which would prevent the statute from running against it will also prevent the statute from running against the remedy on the security': *Carson v. Cochran*, 52 Minn. 67, 53 N. W. 1130. See also, *Wiltsee on Mortgages*, sec. 65; 2 *Jones on Mortgages*, secs. 1214b, 1201, 1202; 2 *Pingrey on Mortgages*, secs. 1570, 1572.

'I will now refer to the cases cited in support of the conclusion that the absence of the mortgagor does not toll the statute. We are agreed that *Anderson v. Baxter*, 4 Or. 105, and *Peters v. Dannels*, 5 Neb. 460, which hold that the action is in rem, are unsound.

and furnish no precedent for the construction or application of this statute. *Tate v. Hawkins*, 81 Ky. 577, 50 Am. Rep. 181, does not touch the question of absence, or the effect to be given to the statute involved in this case. *Fowler v. Wood*, 78 Hun, 304, 28 N. Y. Supp. 976, affirmed without opinion in 150 N. Y. 584, 44 N. E. 1124, is in its facts wholly unlike the case at bar. It was not a case like this, in which the grantee of an absent mortgagor pleads the statute. The mortgagor had mortgaged her own property to secure the debt of another. The plea of the statute was interposed by the mortgagor, and she had resided in the state for the full period. The court held that the absence of the maker of the note, to secure which she had mortgaged her individual property, did not toll the statute as to the action to foreclose her mortgage, and upon the ground that she was the obligor and that it was her obligation which was being enforced, a position which is in entire accord with the cases previously cited, and, in my view, a correct application of the statute. In *Bush v. White*, 85 Mo. 339, an ejectment action, the court apparently was of the opinion that the mortgagor's absence would toll the statute if he still held the title, but held that his absence would not toll the statute after he had parted with his title. This conclusion rests upon the following statement: 'If the mortgagor's absence happens after he has parted with his estate, the reasons for deducting his absence, so far as any proceeding against the land is concerned, are wanting. He has ceased to be a necessary party to such proceeding as it rests in the ordinary process of suits. His assigns and the owner of the land is a necessary party to the ordinary process of law for the purpose of foreclosing the mortgage, and the debtor is not a necessary party.' The reason upon which this case rests is directly opposed to that stated in *Lackland v. Smith*, 5 Mo. App. 153, an action in equity against one Garesche, the resident holder of the legal title upon a cause of action against Smith. It was argued that the action might have been commenced at any time by personal service on Garesche and publication against Smith. The court said: 'It seems to be a sufficient answer to this objection to say that a cause of action accrued against Smith, and that the statute is express that in every such case the time of absence from the state shall be counted out: *Wag. Stats.*, p. 919, sec. 16. The fact that one has left property in the state, subject to attachment, does not keep the statute running: *Hancock v. Heugh*, 1 Mo. 678. And because plaintiff might have brought suit by publication, it does not follow that he was guilty of laches in not doing so: *Fisher v. Fisher*, 43 Miss. 212. Process of law could not be served on Smith, and, whilst this was so, the statute was arrested as to any cause of action accruing against him.' In *Arthur v. Screven*, 39 S. C. 77, 17 S. E. 640, a foreclosure action, the grantee of a mortgagor stood upon two defenses: (1) That he was an innocent purchaser; and (2) upon the statute of limitations.

The court, after sustaining the first defense, also held that the plea of the statute was good, stating that 'the provisions of the section relating to absence relate only to absentees, and have no reference whatever to any person who may be liable to a suit even upon the same cause of action accruing at the same time; otherwise, if two persons should sign a joint and several promissory note, and one of them should leave the state and never return, the other could never plead the statute of limitations to an action on their breach of contract evidenced by the note.' In *Wood v. Goodfellow*, 43 Cal. 185, two of the three members of which that court was then composed, the chief justice dissenting, held, upon a plea interposed by the resident grantee, that the mortgagor's absence did not prevent the running of the statute. The ground of their decision is contained in the following quotation: 'When the mortgagor has parted with his title to the property and ceases to have any interest therein, those who have succeeded to his rights stand in the same relation to the mortgage as if they had originally made the mortgage on their own property to secure the debt of the mortgagor. The mortgagor has no interest in the property, nor are they under obligation to pay his debt. Their property, however, is bound as collateral security for its payment under the mortgage, which is a contract in writing by which the property is pledged as security for the debt.' The court said that the argument that the grantee's absence extended the period would be impregnable, 'if it were conceded that the grantee who has succeeded to and now holds the equity of redemption of the mortgage occupied precisely his status under the statute.' In reaching its conclusion, the majority assumed that the relation of the grantee to the mortgagee was the same as one who mortgages his own property to secure the debt of another, and, in fact, used that illustration to elucidate and fortify its conclusions. This case was presented to the supreme court of Kansas in *Waterson v. Kirkwood*, 17 Kan. 9, when the question was new in that state, and that court declared that this 'decision is not good law in Kansas,' and, in my view, it should not be held good law in North Dakota. In *George v. Butler*, 26 Wash. 456, 90 Am. St. Rep. 756, 67 Pac. 263, 57 L. R. A. 396, the supreme court of that state adopted the doctrine of *Wood v. Goodfellow*, 43 Cal. 185, from which it quoted at length, the case which was repudiated by the supreme court of Kansas. In *Denny v. Palmer*, 26 Wash. 469, 90 Am. St. Rep. 766, 67 Pac. 268, the court restricted the scope of the decision just cited to some extent by holding that notice of some kind to the mortgagee of the transfer is necessary, and denied the right of a resident grantee to plead the statute, upon the ground that he was estopped by his failure to record his deed. The court said: 'It appears that respondent did not know that he had a cause of action against appellant prior to the time the deed was recorded. He knew he held a

cause of action against the mortgagor as to which the statute of limitations had not run because of the mortgagor's absence from the state, but he could not, under any principle of reason and justice, be chargeable with notice that appellant had any interest in the land, unless appellant's deed had been of record, or some actual knowledge of its existence been brought home to him or his assigns.' In the later case of *De Voe v. Rundle*, 33 Wash. 604, 74 Pac. 836, that court evidenced some misgivings as to the correctness of the rule it had adopted, and, after conceding that a conflict of authority existed, stated that, inasmuch as it had previously adopted the California rule, it should be followed, 'thus preserving the harmonious application of the principle heretofore adopted in a former decision.' That the conclusion in each of the cases referred to is grounded either upon error of law or of fact is manifest. The Missouri case rests, not upon statute, but upon the ground of expediency and the court's individual reasons why it should not apply to grantees; the South Carolina case to some extent rests upon the same reason, but also upon the erroneous assumption that the grantee and mortgagor are in legal effect joint obligors. The California court, followed by the Washington court, fell into substantially the same error in assuming that 'the grantee's legal relation to the mortgage is the same as that of one who mortgages his own property to secure the debt of another. If the assumption in the cases last referred to were correct, the conclusion would not be subject to criticism, for in that event the grantee, as an obligor, would be, within the statute, a person against whom 'the cause of action accrued.' That 'the cause of action' is not against him, and that the obligation being enforced is not his, but that of the mortgagor, has already been pointed out. The error in these cases should not be perpetuated by our approval, and I cannot assent to an alteration of the meaning of the statute to cure them. Neither can I assent to the doctrine laid down by my associates as to the duties of mortgagees. This doctrine requires that mortgagees shall know, and at their peril must know, at all times after the mortgagor's default, and during the entire ten years in which the right to foreclose is optional, what persons, if any, have acquired subsequent and subordinate interests in the mortgaged premises by purchase or otherwise, and whether such persons, or any of them, are residing within the state or are absent therefrom, and, if absent, the date of departure of each and the date of their return. Under the rule laid down by the majority, a mortgagee whose mortgage is duly recorded may not rely upon the notice of the character and extent of his interest which is imparted under the recording act to those who subsequently acquire interests in the mortgaged premises as a full performance of his duty.

"This doctrine, in my opinion, nullifies the effect of the recording laws; i. e., that an instrument duly recorded imparts notice to

The court, after sustaining the first defense, also held that the plea of the statute was good, stating that 'the provisions of the section relating to absence relate only to absentees, and have no reference whatever to any person who may be liable to a suit even upon the same cause of action accruing at the same time; otherwise, if two persons should sign a joint and several promissory note, and one of them should leave the state and never return, the other could never plead the statute of limitations to an action on their breach of contract evidenced by the note.' In *Wood v. Goodfellow*, 43 Cal. 185, two of the three members of which that court was then composed, the chief justice dissenting, held, upon a plea interposed by the resident grantee, that the mortgagor's absence did not prevent the running of the statute. The ground of their decision is contained in the following quotation: 'When the mortgagor has parted with his title to the property and ceases to have any interest therein, those who have succeeded to his rights stand in the same relation to the mortgage as if they had originally made the mortgage on their own property to secure the debt of the mortgagor. The mortgagor has no interest in the property, nor are they under obligation to pay his debt. Their property, however, is bound as collateral security for its payment under the mortgage, which is a contract in writing by which the property is pledged as security for the debt.' The court said that the argument that the grantee's absence extended the period would be impregnable, 'if it were conceded that the grantee who has succeeded to and now holds the equity of redemption of the mortgagor occupied precisely his status under the statute.' In reaching its conclusion, the majority assumed that the relation of the grantee to the mortgagee was the same as one who mortgages his own property to secure the debt of another, and, in fact, used that illustration to elucidate and fortify its conclusions. This case was presented to the supreme court of Kansas in *Waterson v. Kirkwood*, 17 Kan. 9, when the question was new in that state, and that court declared that this 'decision is not good law in Kansas,' and, in my view, it should not be held good law in North Dakota. In *George v. Butler*, 26 Wash. 456, 90 Am. St. Rep. 756, 67 Pac. 263, 57 L. R. A. 396, the supreme court of that state adopted the doctrine of *Wood v. Goodfellow*, 43 Cal. 185, from which it quoted at length, the case which was repudiated by the supreme court of Kansas. In *Denny v. Palmer*, 26 Wash. 469, 90 Am. St. Rep. 766, 67 Pac. 268, the court restricted the scope of the decision just cited to some extent by holding that notice of some kind to the mortgagee of the transfer is necessary, and denied the right of a resident grantee to plead the statute, upon the ground that he was estopped by his failure to record his deed. The court said: 'It appears that respondent did not know that he had a cause of action against appellant prior to the time the deed was recorded. He knew he held a



cause of action against the mortgagor as to which the statute of limitations had not run because of the mortgagor's absence from the state, but he could not, under any principle of reason and justice, be chargeable with notice that appellant had any interest in the land, unless appellant's deed had been of record, or some actual knowledge of its existence been brought home to him or his assigns.' In the later case of *De Voe v. Rundle*, 33 Wash. 604, 74 Pac. 836, that court evidenced some misgivings as to the correctness of the rule it had adopted, and, after conceding that a conflict of authority existed, stated that, inasmuch as it had previously adopted the California rule, it should be followed, 'thus preserving the harmonious application of the principle heretofore adopted in a former decision.' That the conclusion in each of the cases referred to is grounded either upon error of law or of fact is manifest. The Missouri case rests, not upon statute, but upon the ground of expediency and the court's individual reasons why it should not apply to grantees; the South Carolina case to some extent rests upon the same reason, but also upon the erroneous assumption that the grantee and mortgagor are in legal effect joint obligors. The California court, followed by the Washington court, fell into substantially the same error in assuming that 'the grantee's legal relation to the mortgage is the same as that of one who mortgages his own property to secure the debt of another. If the assumption in the cases last referred to were correct, the conclusion would not be subject to criticism, for in that event the grantee, as an obligor, would be, within the statute, a person against whom 'the cause of action accrued.' That 'the cause of action' is not against him, and that the obligation being enforced is not his, but that of the mortgagor, has already been pointed out. The error in these cases should not be perpetuated by our approval, and I cannot assent to an alteration of the meaning of the statute to cure them. Neither can I assent to the doctrine laid down by my associates as to the duties of mortgagees. This doctrine requires that mortgagees shall know, and at their peril must know, at all times after the mortgagor's default, and during the entire ten years in which the right to foreclose is optional, what persons, if any, have acquired subsequent and subordinate interests in the mortgaged premises by purchase or otherwise, and whether such persons, or any of them, are residing within the state or are absent therefrom, and, if absent, the date of departure of each and the date of their return. Under the rule laid down by the majority, a mortgagee whose mortgage is duly recorded may not rely upon the notice of the character and extent of his interest which is imparted under the recording act to those who subsequently acquire interests in the mortgaged premises as a full performance of his duty.

"This doctrine, in my opinion, nullifies the effect of the recording laws; i. e., that an instrument duly recorded imparts notice to

subsequent purchasers and encumbrancers—that such persons are bound to know of prior transfers—and reverses the obligation in this: That it requires that prior encumbrancers shall be bound to a knowledge of subsequent transfers. It not only exacts instant knowledge of the fact of subsequent transfers, but also of the names and places of residence of the persons acquiring such subsequent interests—persons with whom the mortgagee has no contractual relations, who owe him no obligation, and of whose very existence he may be, and often is, entirely ignorant. I know of no legal principle or statute upon which this rule may rest. As an arbitrary rule of duty, it will in many cases require the impossible. If it is meant to bind mortgagees to this knowledge only when the subsequent conveyances are placed of record, it is clear that the rule is unsound, for: (1) 'The registration of a deed given by a mortgagor subsequent to the mortgage is no notice of such conveyance to the mortgagee. The latter is under no obligation to search for such conveyance': *New York Life Ins. Co. v. Covert*, 6 Abb. Pr., N. S., 154; *Webb on Record Title*, secs. 4, 152. And (2) even if the recording of a subsequent transfer could be said to impart notice to the holders of prior transfers which are of record (a point which will not be admitted), it cannot be claimed that it imparts continuous notice of the place of residence, and changes in places of residence, of the holders of such subsequent interests. (Since the opinion in this case was filed, the majority of the court have held, in the companion case of *Paine v. Dodds*, 14 N. Dak. 189, 103 N. W. 931, that the statute will run only from the date of the filing of the deed for record.)

"It is well settled, I think, that the mortgagee has done his full duty when he records his mortgage, and in this manner announces to all persons who may subsequently deal with the premises the extent of his interest. He may then remain silent: *Dick v. Balch*, 8 Pet. (U. S.) 30, 8 L. ed. 856. And no negligence can be imputed to him for so doing. No restriction is placed upon his right to foreclose so long as he exercises it within the statutory period, and he is not chargeable with negligence because he elects to delay the enforcement of his security. Heretofore, it has not been counted a fault for a creditor to indulge his debtor, but rather an act of grace and favor, to be met with commendation rather than punishment.

"It is not necessary to make the subsequent grantees or lienholders parties to the action, unless at the time the action is commenced (and that may always be just prior to the expiration of the ten-year period) their conveyances and liens are then of record. He is not required to consult the records until that time, and then only for the purpose of ascertaining the names of the persons who have acquired interests subsequent to his mortgage, in order to join them as defendants. Section 5231, Revised Codes, reads as

follows: 'In an action to foreclose a mortgage or other lien upon real property, no person holding a conveyance from or under the mortgagor of the property mortgaged or other owner thereof, or having a lien upon such property, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered and the proceedings therein had are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.'

"The rule laid down by the majority establishes different periods of limitation in the same action, and upon the plea of those who are merely parties to the action, which will be determined by the fact of their presence in or absence from the state and the length of their absence, instead of one period fixed by the presence or absence of the person whose obligation is being enforced and against whom the cause of action accrues; and, if I am correct in my views, it announces a new rule of property, the effect of which is to transfer interests and rights in real estate which have become vested. I cannot, therefore, consent to the adoption of this doctrine without protest.

"From my standpoint, the question as to the right of a foreign corporation to plead the statute is not vital, and I therefore express no opinion upon that point.

"The judgment of the trial court, in my view, is proper, and should be affirmed."

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*A Foreign Corporation may Rely on the Statute of Limitations* to the same extent as though chartered by the state, if it has a local existence and domicile therein for the purpose of suing and being sued: See the note to *Hopkins v. Clyde*, 104 Am. St. Rep. 749, on who may plead the statute of limitations.

*A Subsequent Grantee of a Mortgagor may Plead the Statute of Limitations* against an action to foreclose the mortgage, he not being obligated to pay the debt, although the statute has not run against the mortgagor and maker of the note secured thereby, by reason of his absence from the state: *George v. Butler*, 26 Wash. 456, 90 Am. St. Rep. 756. See, however, *Jenks v. Shaw*, 99 Iowa, 604, 61 Am. St. Rep. 256; *Perkins v. Bailey*, 38 Wash. 46, 107 Am. St. Rep. 831.

*The Bar of a Mortgage Debt by the Statute of Limitations* as barring the right to foreclose the mortgage is a question upon which the authorities are not agreed: See the note to *Menzel v. Hinton*, 95 Am. St. Rep. 664, and to the subsequent case of *George v. Butler*, 26 Wash. 456, 90 Am. St. Rep. 756.

**COLONIAL AND UNITED STATES MORTGAGE COMPANY v. FLEMINGTON.**

[14 N. Dak. 181, 103 N. W. 929.]

**LIMITATION OF ACTIONS—Foreclosure Proceedings.**—An action to foreclose a mortgage of real property is not one in rem, but is in personam against those interested in the mortgaged property adversely to the mortgage, and the absence from the state of the person against whom the cause of action accrues tolls the statute of limitations as to him during his absence. (p. 671.)

**LIMITATION OF ACTIONS.—Right to Foreclose** a real estate mortgage may be barred by limitation, even though the debt still exists and the remedies for its collection from those personally liable therefor are not barred. (p. 671.)

**LIMITATION OF ACTIONS.—Right of Mortgagor's Heirs to Plead on Foreclosure.**—The failure to appoint an administrator of the estate of a deceased mortgagor and debtor does not prevent the statute of limitations from running in favor of the mortgagor's heirs against an action to foreclose the mortgage. (p. 672.)

Newman, Spalding & Stambaugh, for the appellant.

C. M. Stevens and E. E. Cassels, for the respondent.

<sup>185</sup> ENGERUD, J. On November 23, 1883, William R. Carey made and delivered to the plaintiff a mortgage of a quarter section of land owned by him in Dickey county, to secure the payment of his promissory note to the plaintiff, of even date, for three hundred and fifty-three dollars, due November 1, 1888, bearing interest at the rate of six and one-half per cent per annum, and to secure five coupon notes for the annual interest on the principal note. The coupon notes bear interest at the rate of twelve per cent per annum after maturity. The mortgagor died intestate in September, 1888, seised of the mortgaged land, and left surviving him, as sole heirs, four daughters, Laura Franke, Louisa Atherton, Sophronia D. Schafer and Alice J. Rose. Mrs. Rose is now, and has been since her father's death, a resident of this state, but the other three daughters have at all times resided in the state of Illinois. Letters of administration have never been applied for or issued on the estate of the deceased mortgagor. In June, 1902, the four heirs joined in a deed of the mortgaged land to the defendant and respondent, Alexander Flemington, and said deed was recorded August 14, 1902. On March 28, 1902, the plaintiff commenced this action

against Flemington and one Schaller to foreclose said mortgage. Schaller made no answer, and it appears that he claims no right to the land. The only defense was the statute of limitations, and that defense was sustained by the trial court. The plaintiff has appealed from the judgment dismissing the action, and demands a retrial of all the issues under section 5630 of the Revised Codes of 1899.

Many of the questions arising in this case have been disposed of by the opinion just handed down in Colonial etc. Mortgage Co. v. Northwest Thresher Co., 14 N. Dak. 147, 103 N. W. 915. We there held that an action to foreclose a mortgage of real property was not one in rem, but was in personam against those interested in the mortgaged property adversely to the mortgage, and hence, under section 5210 of the Revised Codes of 1899, the absence from the state of the person against whom the cause of action accrued tolled the statute as to him during his absence. We also held that the right to foreclose the mortgage might be barred, even though the debt existed, and the remedies for the collection of the debt from those personally liable therefor were not barred.

In this case as in the Thresher Company case (14 N. Dak. 147, 103 N. W. 915), the appellant contends that the land passed to the heirs subject to the mortgage, and therefore became a primary fund for the payment of the mortgage <sup>188</sup> debt for the protection of the estate of the deceased mortgagor against liability for the debt, and hence neither the heirs nor their grantee could plead the statute as long as the debtor's estate is liable on the debt. For the reasons stated in the case cited, this contention is overruled. It is, therefore, immaterial to this case to determine what effect the failure to have an administrator appointed had upon the right of the mortgagee to collect the debt from the estate of the deceased debtor.

Both parties agree that the heirs were necessary parties defendant in an action to foreclose this mortgage, if the action had been commenced before the conveyance to respondent. The four heirs succeeded to the deceased mortgagor's title before the mortgage debt was due, and held the title continuously from that time until June, 1902. The cause of action accrued in November, 1888. As to the undivided one-fourth of the land which descended to Alice J. Rose, the

statutory bar was complete in November, 1898. The absence from the state of the other three heirs prevented the statute from running in their favor as to the undivided three-fourths of the land which they inherited.

It follows that the respondent's plea must be sustained as to an undivided one-fourth of the land, and that the appellant is entitled to the relief demanded to the extent of the remaining three-fourths of the land. There being no dispute as to the facts, it is a mere matter of computation to determine the amount due on the mortgage. Interest will be computed on the principal note from November 1, 1888, at the rate of six and one-half per cent per annum, simple interest, without annual rests. In the absence of a provision to the contrary, the note bears the same rate after maturity as before: Rev. Codes 1899, sec. 4068. The provision that the interest is payable annually only relates to the interest accruing before maturity. Interest on the three unpaid coupons in like manner at the rate of twelve per cent per annum from the maturity of the respective coupons. To the amount due on the note and coupons will be added the sums paid by the plaintiff for taxes on said premises as set forth in the complaint, and interest will be computed on the several sums so paid from the dates of the respective payments at the rate of six and one-half per cent per annum. The appellant is entitled to the taxable costs and disbursements of both courts against respondent.

<sup>187</sup> The cause is remanded to the district court, which will set aside the judgment appealed from, and render a judgment in accordance with this opinion.

Morgan, C. J., concurs.

Mr. Justice Young Dissented and said: "In my opinion, this action is not barred. The action is in personam. We are agreed that the provisions of the statute which suspend the running of the statute of limitations upon the death or absence of the person against whom the cause of action accrued apply with the same force and effect to actions to foreclose a real estate mortgage as to other personal actions. The mortgagor's note was due November 1, 1888. Had he been alive and residing in the state upon that date, and defaulted in paying the note, a cause of action would have accrued against him, and the statute would have commenced to run against all remedies to enforce payment, including the present action. The

record shows, however, that he died in September preceding the maturity of the note, and that no administrator has been appointed. The statute of limitations has not, therefore, commenced to run, and this action is not barred. It is well settled that a cause of action which has not accrued prior to the debtor's death does not accrue within the meaning of the statute of limitations and start the statute running until a personal representative is appointed. The rule that 'the statute of limitations does not begin to run when no administration exists on the decedent's estate at the time the cause of action accrued' may, I think, be said to be of general application: *Benjamin v. De Groot*, 1 Denio, 151; *Davis v. Garr*, 6 N. Y. 124, 55 Am. Dec. 387; *Sanford v. Sanford*, 62 N. Y. 553; *Bucklin v. Ford*, 5 Barb. (N. Y.) 393; *Weitman v. Thiot*, 64 Ga. 11; *Hobart v. Connecticut Turnpike Co.*, 15 Conn. 145; *Marsteller v. Marsteller*, 93 Pa. 350; *Murray v. East India Co.*, 5 Barn. & Ald. 204; *Danglada v. De La Guerra*, 10 Cal. 386; *Smith v. Hall*, 19 Cal. 85; *In re Bullard's Estate*, 116 Cal. 355, 48 Pac. 219.

"The majority opinion assumes that the cause of action accrued against the several heirs of the mortgagor; that the statute, therefore, commenced to run; that it was suspended as to the three heirs who were absent from the state, and as to them the action is not barred; that it was not suspended as to the heir residing in the state, and as to her the action is barred. The assumption that the cause of action accrued against the heirs is, in my opinion, entirely erroneous. It is true that the title to the mortgaged premises passed to the heirs upon the mortgagor's death, but it was the title only which passed to them. The obligation of the mortgagor did not pass. The mortgagor's obligation, which this action is brought to enforce, did not, by his death, become their obligation, and they have not made it their obligation. They merely succeeded to his title, subject, as it was in him, to the plaintiff's mortgage. The mortgage debt is not their debt, and they do not owe the obligation which the plaintiff is seeking to enforce. They have made no default, and it cannot properly be said, therefore, that the cause of action accrued against them. They are merely parties to the action brought to enforce the obligation of the mortgagor. The statute does not take account of parties to an action as such in fixing the time when the statute commences to run or when it is suspended, but rather the person or persons against whom the cause of action accrues, and the heirs are not the persons against whom the cause of action accrued. Substantially the same question was involved in *Colonial etc. Mortgage Co. v. Northwest Thresher Co.*, 14 N. Dak. 147, ante, p. 642, 103 N. W. 915, in which the opinion has been handed down.

"My views are there stated at length in a dissenting opinion, and need not now be restated. I may say, however, that the rule, as applied by the majority, in this case goes farther and is more objectionable than in the case referred to. In that case it was held

that a mortgagee whose mortgage was recorded was bound at his peril to know that subsequent transfers had been made by the mortgagor, who the grantees were, and, in effect, where they resided. The rule, as applied in this case, charges mortgagees with immediate knowledge of the mortgagor's death, whether he died testate or intestate, and, if intestate, whether he left heirs, and, if so, how many and where they reside, and, if absent from the state, the correct dates of their departure and return. If he is ignorant of the fact, as he usually will be, or is mistaken as to the fact, as he often must be, he forfeits his security to those whose interests in the mortgaged premises are subordinate to his interest. This, considered either as a rule of law or of duty, is, in my opinion, indefensible.

"The statute not having run, the judgment of the trial court should be reversed, and judgment entered for the plaintiff as prayed for in its complaint."

*The Principal Case* affirms the rulings in regard to limitation of actions against mortgage foreclosures which were involved in *Colonial etc. Mtg. Co. v. Northwest Thresher Co.*, 14 N. Dak. 147, ante, p. 642. See the cross-reference note thereto for authorities from other states. The principal case is itself affirmed in *Paine v. Dodds*, 14 N. Dak. 189, post, p. 674.

## PAINE v. DODDS.

[14 N. Dak. 187, 103 N. W. 931.]

**LIMITATION OF ACTIONS—Foreclosure Proceedings.**—An action to foreclose a real property mortgage is a proceeding in personam and not in rem, and within the operation of a statute excepting from the period limited for commencing an action the time during which the person against whom the cause of action has accrued is absent from the state. (p. 677.)

**LIMITATION OF ACTIONS—Foreclosure Proceedings—Grantee of Mortgagor.**—Although mortgaged property has passed to the defendant's grantor, subject to the mortgage, and is in equity the primary fund for the payment of the mortgage debt, the defendant is still entitled to avail himself of the plea of the statute of limitations as a defense to an action to foreclose the mortgage. (p. 678.)

**LIMITATION OF ACTIONS—Absence from State.**—If a person against whom a cause of action has accrued departs from and establishes his residence out of the state, the statute of limitations ceases to run in his favor from the date of his departure. (p. 678.)

**LIMITATION OF ACTIONS—Absence from State.**—A statute providing that only absences of one year or more from the state shall toll the running of the statute of limitations refers to an absence by one who has not established a residence out of the state. (p. 678.)



**LIMITATION OF ACTIONS—Tacking—Mortgage Foreclosure.**

A grantee of mortgaged premises may add to the time that the statute of limitations has run in his favor the time it has run in favor of his grantor, in order to make up the aggregate period required to bar an action of foreclosure. (p. 679.)

**LIMITATION OF ACTIONS—Tolling of Statute—Burden of Proof.**—If plaintiff's pleadings and evidence show that the cause of action accrued more than ten years before the commencement of the action, the burden of proof is on him to show that the running of the statute has been suspended a sufficient length of time to avoid the statutory bar of limitation pleaded by the defendant. (p. 680.)

**LIMITATION OF ACTIONS—New Trial.**—If the evidence tends to show that the action is barred by limitation as to one or more unequal parts of the land which is undivided, and not barred as to other parts, but fails to disclose as to which parts the statutory bar is complete, and such uncertainty in the proof is due to the fact that neither the trial court nor counsel deemed such proof material, a new trial will be ordered. (p. 681.)

Newman, Spalding & Stambaugh, for the appellant.

T. B. Bangs, for the respondent.

<sup>194</sup> **engerud, J.** This is an appeal by plaintiff from a judgment dismissing an action to foreclose a mortgage on real property. The trial court held that the action was barred by the statute of limitations, which was the only defense relied upon. The appeal is under section 5630 of the Revised Codes of 1899, and, although a new trial of all the issues is demanded by the appellant, the only issue on which there is any controversy is that raised by the plea of the statute of limitations.

On December 24, 1883, James Dodds made and delivered to John R. Paine a principal promissory note for two hundred and fifty dollars, payable January 1, 1887, bearing interest at the rate of ten per cent per annum, and three coupon notes for the annual interest due respectively on January 1, 1885, 1886, and 1887. To secure the payment of this debt, James Dodd made and delivered to John R. Paine the mortgage in question, covering a quarter section of land owned by the mortgagor in Nelson county, which mortgage was duly recorded January 2, 1884. The mortgagor died intestate November 5, 1884, seised of the mortgaged land, and left surviving him, as his heirs, his widow, Helen Dodds, and three children, David S. Dodds, Mary Colson and Jennie G. Wolff. Letters of administration upon the estate of James Dodds, deceased, were issued in Nelson county to the

son, David S. Dodds, April 22, 1885. On April 16, 1887, pursuant to an order of the county court of Nelson county, the premises in question were set apart to the widow, Helen Dodds, as a homestead. David S. Dodds left the state of North Dakota about the middle of the year 1896, and took up his residence in California, where he died in February, 1902. He had never closed up the administration of his father's estate. David Dodds died intestate, leaving surviving him a widow, Mary Dodds, but no children. The mortgagor's daughter Jennie G. Wolff also died intestate, and left as her heirs her husband, Christopher J. Wolff, William Charles Wolff, Mamie Helen Wolff, Louis Joseph Wolff, and David Sidney Wolff. The last two named are minors. The evidence fails to show when or where Jennie G. Wolff died. All these heirs have been nonresidents and absent from this state since 1896, but the evidence does not disclose whether they left the state in that year or before, except that it is stipulated that David Dodds left about the middle of 1896, and his widow, Mary Dodds, has never resided <sup>195</sup> in this state. As to the others, the only evidence as to the time of their departure is a stipulation that they "left the state of North Dakota and took up their residence in the state of California in the year 1896, and prior to that time." We infer from the language of this stipulation that the heirs mentioned left at different times, some in 1896 and some before. On August 12, 1902, John Hennessy was by the county court of Nelson county appointed administrator of the estate of James Dodds, the mortgagor, to succeed David S. Dodds, deceased, and the said Hennessy was also appointed guardian of the estate of the two minor heirs, Louis Joseph and David Sidney Wolff. All the adult heirs have conveyed their respective shares in the mortgaged land to defendant M. Frich by deeds without covenants, which deeds were executed and delivered during the months of February, April and May, 1902, and were all recorded after delivery, and on or before May 17, 1902. The shares of the two minor heirs were sold and conveyed to the defendant Frich by the guardian's deed, January 19, 1903, which deed was recorded the same day. In December, 1898, the mortgage and the debt secured thereby were assigned to the plaintiff. The debt secured by the mortgage was never presented for allowance as a claim against the estate of the deceased mortgagor. The adminis-

tration of that estate was closed and the administrator discharged in March, 1903, after the commencement of this action. This suit was commenced January 18, 1902, naming as defendants all the heirs of the deceased mortgagor, the administrator of his estate, the guardian of the two heirs and M. Frich, the present owner of the land. The only relief sought is a judgment foreclosing their lien on the land for the amount of the debt and certain taxes paid by the plaintiff.

All the heirs except the two minors had ceased to have any interest in the premises long before the action was commenced, and they were improperly joined as parties defendant. The administrator and the guardian were discharged and their respective trusts terminated, and the rights of the minor heirs had been conveyed to Frich, before the action was tried. It is, therefore, clear that the action was properly dismissed as to all the defendants except Frich.

The main proposition upon which respondents' counsel rely in support of their claim that the action is barred is that an action to foreclose a mortgage on real property is in the nature of a proceeding <sup>196</sup> in rem, and hence is not affected by section 5210 of the Revised Codes, which excepts from the limitation period the time during which the person against whom the cause of action accrued is absent from the state. This proposition cannot be sustained, for the reasons given in *Colonial etc. Mortgage Co. v. Northwest Thresher Co.*, 14 N. Dak. 147, ante, p. 642, 103 N. W. 915, and *Colonial etc. Mortgage Co. v. Flemington*, 14 N. Dak. 181, ante, p. 670, 103 N. W. 929, the opinions in which have just been filed.

Appellant's main proposition is that the land descended to the heirs subject to the mortgage, and became, therefore, the primary fund for the payment of the debt, and that the heirs or their grantee could not plead the statutory bar against their action, which is, in effect, one to subject that primary fund to the purposes for which it was created. This proposition was also overruled in the two preceding cases.

For the reasons stated in these two decisions, the widow and three children of the mortgagor were the persons against whom this cause of action accrued. The action was not barred as to them or the heirs of those of them who had died

at the time defendant Frich acquired their respective shares of the land. The cause of action accrued January 6, 1887. The note being nominally payable January 1, 1887, which was a legal holiday, was actually payable January 2, 1887. At that time the territory law allowed three days of grace: Comp. Laws 1887, sec. 4524. As no suit could be commenced until January 6th, the statutory bar would not be complete until January 6, 1897, but before that time all the living heirs had left the state and taken up their residence in California. Consequently, as to them, the statute ceased running when they left the state, because section 5210 of the Revised Codes of 1899 provides that if a person against whom a cause of action shall have accrued "shall depart from and reside out of this state, . . . the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." We think the clause "or remain continuously absent therefrom for the space of one year or more," which we omitted from the quotation of the section as indicated by the points, refers to absences from the state where no residence is established elsewhere. To construe the statute otherwise would deprive the creditor of the full ten years which the statute was intended to allow within which to commence an action by personal service of the summons: *Bassett v. Bassett*, 55 Barb. 505; *First Nat. Bank v. Bissell*, 7 N. Y. Supp. 53.

<sup>197</sup> The decisive question of law in this case, therefore, is this: Can the defendant Frich add to the time which the statute had run in favor of her predecessor in the title the time she owned the land before the action was commenced, in order to make out the full statutory period of ten years? This question must be answered in the affirmative. Section 5210 excepts from the limitation period the time that the person against whom the cause of action accrued is absent from the state. If this language was construed to mean that absences only on the part of the person against whom the cause of action originally existed would toll the statute, it would defeat the object of the statute. If the owner of mortgaged land after default sold the land and left the state, an action to foreclose the mortgage would never be barred until the death of the absent grantor. Again, if such fee owner died in this state after the cause of action accrued against him, and all his heirs were nonresidents, the statute

would continue running against the right to foreclose, notwithstanding the absence of the heirs and the impossibility of obtaining personal service upon them. Both the letter and the spirit of the statute forbid such an interpretation of it. Section 5199 of the Revised Codes of 1899 provides: "The following actions must be commenced within the following periods after the cause of action has accrued." Then follows the enumeration of the various actions and of the time limited for commencement of the same. It will be noticed that section 5199 does not fix the commencement of the limitation period at the time when the cause of action accrued against the particular person who may subsequently plead the statute. By virtue of this section the limitation period begins to run against the right to maintain an action as soon as the right to such an action comes into existence. Section 5210, however, excepts from the time limited for commencing an action the time that the person against whom the cause of action shall have accrued is absent from the state. The person referred to in section 5210 is not necessarily the person against whom the cause of action first accrued. The same cause of action may have accrued against two or more persons at the same time, or against each of them at different times. When a debtor dies, the cause of action survives against the personal representative. The cause of action remains the same after the death of the debtor as before. Such a cause of action accrues when the debt is due. It first accrues against the debtor, and, after his death, it accrues against his personal representative. So, also, <sup>198</sup> a cause of action for the enforcement of a lien upon or other right to specific property. The cause of action first accrues when the right to resort to that remedy arises. And we held in *Colonial etc. Mortgage Co. v. Northwest Thresher Co.*, 14 N. Dak. 147, ante, p. 642, 103 N. W. 915, such a cause of action accrues against the person or persons who are interested in the land adversely to the plaintiff's alleged right. It accrued, in the first place, against the then adverse parties. If the adverse rights of those persons to the property pass by contract or operation of law to other persons, the same cause of action continues, but the transferees become the persons against whom the same cause of action has accrued. The principles upon which the doctrine of "tacking" is based are applicable in

such a case, and for the same reasons, as in a case of adverse possession. To illustrate the application of that principle, we cite the following cases: *Moffit v. McDonald*, 30 Tenn. (3 Humph.) 457; *Nelson v. Trigg*, 72 Tenn. (4 Lea) 701; *Smith v. Chapin*, 31 Conn. 530. As we stated in *Colonial etc. Mortgage Co. v. Northwest Thresher Co.*, 14 Dak. 147, ante, p. 642, 103 N. W. 915, we construe the term "cause of action" as used in the statute of limitations to be synonymous with the term "right of action." Construing the term "cause of action" in that sense, and reading sections 5199 and 5210 together, we get this meaning from them: The plaintiff must commence his action within the prescribed number of years after his cause of action first accrued, but the absence from the state of any person against whom the right of action has at any time accrued tolls the statute during such absence as against such absentee or his successor in interest. We held in *Colonial etc. Mortgage Co. v. Northwest Thresher Co.*, 14 N. Dak. 147, ante, p. 642, 103 N. W. 915, that the mortgagee, after his cause of action had accrued, and before he commenced his action, was daily put on inquiry as to the parties against whom his remedy must be enforced. It follows as a corollary of that proposition that, when a deed of the land is recorded after the cause of action has accrued and before the action has been commenced, the plaintiff is chargeable with knowledge of that fact. We hold, therefore, that the action is barred as to any share of the land of which the successive owners, while holding the title, have been within this state an aggregate period of ten years between January 6, 1887, and the date of the commencement of this action. In computing that time as to any particular share, the time of defendant's ownership should be taken to have begun on the day the deed to her for such share was recorded.

<sup>199</sup> As to the shares of the two minor heirs, it is clear that the action is not barred. The action is barred as to that share of the land inherited by David S. Dodds from his father, because the evidence shows that nine and one-half years have elapsed from the date the cause of action accrued before David S. Dodds left the state, and his share was acquired by Frich, and the latter's deed had been recorded more than six months before the action was commenced. The evidence

fails to show when each of the other heirs left the state, but implies that some left in 1896 and some before. On this evidence it can neither be affirmed or denied that the action is barred as to any particular part of the land other than the respective undivided shares derived from the two minor heirs and from the heirs of David S. Dodds. As to the former, the action is not barred, but as to the latter it is. The plaintiff's own pleadings and evidence showed that the cause of action accrued more than ten years before the commencement of the action, and the burden was, therefore, on him to show, if he could, that the running of the statute had been suspended as to all or some of the heirs by reason of their absence or nonresidence: 19 Am. & Eng. Ency. of Law, 2d ed., pp. 332-334, and cases cited. It follows that the consequences of the absence of proof on the points mentioned would fall upon the plaintiff, if final judgment were to be ordered by us on this record. The statute (Rev. Codes 1899, sec. 5630) governing the trial and appeal of cases of this nature provides that "the supreme court . . . shall finally dispose of the same whenever justice can be done without a new trial, and either affirm or modify the judgment or direct a new judgment to be entered in the district court; the supreme court may, however, if it deem such course necessary to the accomplishment of justice, order a new trial of the action."

It is apparent that the absence of any definite proof as to when each of the several heirs of the deceased mortgagor left the state is due to the fact that neither the trial court nor counsel for either party deemed such evidence material. Under such circumstances it would be unjust to order final judgment on this appeal, and a new trial should be had.

The judgment appealed from is reversed, and the cause remanded for further proceedings in accordance with this opinion. The appellant will recover the taxable costs of this appeal.

Morgan, C. J., concurs.

Mr. Justice Young Dissented and said: "We are all agreed that an action to foreclose a real estate mortgage is an action in personam, and that the statute of limitations, together with those provisions which suspend its running upon the death or absence of the person

against whom the cause of action accrues, apply to it in like manner as the other personal actions. From this, in my opinion, the conclusion necessarily follows that this action is not barred."

*The Principal Case* affirms the previous decisions of the supreme court of North Dakota in *Colonial etc. Mortgage Co. v. Flemington*, 14 N. Dak. 181, ante, p. 670; *Colonial etc. Mortgage Co. v. Northwest Thresher Co.*, 14 N. Dak. 147, ante, p. 642. In the cross-reference note to this latter case will be found authorities from other states.

## MERCHANTS' STATE BANK v. TUFTS.

[14 N. Dak. 238, 103 N. W. 760.]

**DEED as Mortgage to Secure Future Advances—Recording.**—A deed absolute on its face but intended as a mortgage under a parol contract to secure future advances, is properly recorded in a book provided for the recordation of deeds, and such record is notice to subsequent purchasers or encumbrancers that such deed was merely security for future advances. (p. 685.)

**BANKS AND BANKING—Real Estate as Security.**—A bank has authority to take a deed absolute on its face, but intended as a mortgage as security for a past indebtedness as well as for contemplated advances. (p. 685.)

**DEEDS or Mortgages Given to Cover Future Advances** are not fraudulent as matter of law. (p. 686.)

**DEED as Mortgage—Future Advances.**—A deed absolute in terms, but intended as a mortgage with a parol agreement for a reconveyance, is security for the present indebtedness, for which it was given, as well as for money advanced after the execution of the instrument in accordance with the parol contract that it should be security therefor. (p. 687.)

**DEED as Mortgage—Future Advances—Reconveyance.**—Before a grantor of a deed absolute on its face, but intended as a mortgage or mere security for present indebtedness and future advances, can compel a reconveyance to him, he must pay the grantee all the indebtedness due him pursuant to the agreement made for such reconveyance. (p. 687.)

**DEED as Mortgage—Advances After Notice of Lien.**—A grantee in a deed absolute on its face, but intended as a mortgage to secure a present debt and future advances based on a parol agreement, has no right to make further advances after actual notice that subsequent purchasers or encumbrancers have a lien on the land covered by the deed and taken without notice of such parol contract for all future advances. (p. 688.)

**DEED as Mortgage—Marshaling Securities.**—In an action to have a deed absolute on its face declared a mortgage, and for its foreclosure, in which judgment creditors are made defendants, if it appears that the grantee in the deed has other security for his debt, and the judgment creditors have the land only as security, a court of equity will, in a proper case, compel such grantee to exhaust his other security in the property not covered by the judgment lien. (p. 689.)



H. R. Turner, for the appellant.

Newman, Spalding & Stambaugh, for the respondent.

<sup>241</sup> MORGAN, C. J. This is an action to have a deed of real estate declared a mortgage, and for the foreclosure thereof. The facts are that one Tufts was indebted to the plaintiff on and prior to November 10, 1902, in the sum of \$7,307.37. On that day Tufts and his wife made and delivered to the plaintiff the deed in suit, for the purpose of securing the payment of a note for that sum, given on that day. This deed was not recorded until October 28, 1903, and was then recorded as a deed, and not as a mortgage. On November 10, 1902, Tufts also made and delivered to the plaintiff a chattel mortgage on property belonging to him to secure the same note. The chattel mortgage was filed on the same day that the deed was recorded—October 28, 1903. The amended complaint alleges the execution and delivery of the note for \$7,307.37, and the execution and delivery of the deed to secure the payment of the same, and also to secure the payment of all future indebtedness of said defendants to plaintiff. The complaint further alleges that, upon the payment by defendants of such existing indebtedness incurred after the giving of such deed, the plaintiff was to reconvey the premises to the defendants. It is further alleged that plaintiff advanced to the defendants, after the giving of such deed, the sum of \$1,644.46, and paid taxes on the lands amounting to \$126.09, and paid interest on a prior mortgage on said land at the request of Tufts, amounting in all to \$528.04. Judgment is demanded declaring said deed to be mortgage security for all of said sums. The evidence shows that the plaintiff and Tufts entered into a parol agreement, at the time that the deed was executed and delivered, to the effect that the deed should be security for said amount as a present indebtedness, and for all future indebtedness incurred for advances made by plaintiff to Tufts. Neither the deed nor the note <sup>242</sup> nor chattel mortgage contain any reference to the indebtedness to be incurred for advances, but the same rests wholly in parol. The defendant Tufts appeared, but interposed no answer or defense. The defendants McCormick Harvester Machine Company and the Northwestern Port Huron Company answered, and alleged that they secured and owned judgments against the defendant

Tufts for the purchase price of goods sold to him before the deed and chattel mortgage were given to plaintiff, and prayed that the plaintiff be ordered to foreclose the chattel mortgage and apply the proceeds of a sale of the personal property upon the amount due on the \$7,307.37 note. The McCormick Harvesting Machine Company procured its judgment against Tufts for \$957.89 on December 8, 1903, and the same was docketed on that day. The Northwestern Port Huron Company judgment was docketed on November 12, 1903, and was for \$141.92.

There are other material facts shown by the evidence. One Kerr obtained a judgment against Tufts on November 27, 1903, for the sum of \$504.96, and execution was by him caused to be issued and levied upon the personal property described in plaintiff's chattel mortgage, and duly sold on execution sale on January 2, 1904, to one Lathrop, for the sum of \$50, subject to plaintiff's chattel mortgage lien. On January 7, 1904, said Lathrop sold the personal property so purchased by him to the plaintiff for the sum of \$600. Thereafter, on April 2, 1904, the plaintiff sold part of the personal property covered by the chattel mortgage to it, and received as proceeds therefrom the sum of \$2,369.03. The balance of the personal property covered by that mortgage was not sold for want of bidders. This sale was not made by plaintiff under its chattel mortgage, but was made by it as the owner of the property under the sale of the same to it by said Lathrop. The proceeds of this sale were not applied in payment for the Tufts indebtedness. The value of the unsold property is not given, but it consisted of a threshing machine, separator, some binders, a Plano header and a road grader.

The trial court found that the plaintiff was entitled to judgment for \$7,307.37, the original indebtedness, and \$1,644.46, the sum advanced under the parol agreement as to future advances, and the sums paid as accrued interest on a prior mortgage, and taxes paid, and decreed a sale of the real estate to satisfy said indebtedness, and adjudged that the deed was a mortgage and secured <sup>243</sup> these various sums, and was in all respects prior to the judgments owned by the defendants and set forth in their answers. The defendants, as owners of such judgments, appeal from the

judgment, and demand a review of the entire case under section 5630 of the Revised Codes of 1899.

It is claimed that the recording of the deed in the record for deeds, instead of the record for mortgages, was not notice to the defendants of the fact that the deed was security for future advances. The contention is that the judgment creditors are classed as innocent purchasers under the provisions of section 3594 of the Revised Codes of 1899, as amended by chapter 152, page 202, of the Laws of 1903. Conceding, without deciding, such to be the fact, the evidence conclusively shows that no money was paid to Tufts after the judgments were rendered. The deed was properly recorded as a deed, as it was such in form. It was not accompanied by a writing to the effect that it was intended to be a mortgage, hence its recording is not governed by section 4729 of the Revised Codes of 1899. Section 3570 provides that all "grants absolute in terms are to be recorded in one set of books, and mortgages in another." It seems clear, therefore, that the deed was properly recorded, and that its recording is provided for under section 3570 of the Revised Codes of 1899. This seems to be the only conclusion that can reasonably be reached by construing sections 4729 and 3570 together: See, also, Webb on Record Title, secs. 137-139.

It is also insisted that the deed is void for the reason that the plaintiff bank had no authority to receive it under the provisions of the act authorizing the organization of state banks. Section 3230 of the Revised Codes of 1899 is as follows: "Banking associations formed under this chapter shall have power to purchase, hold and convey real estate for the following purposes and no other. . . . (2) Such as shall be mortgaged to it in good faith by way of security for loans or for debts previously contracted. (3) Such as shall be conveyed to it in good faith in satisfaction of debts previously contracted in the course of its dealings." The deed in question was given for loans previously contracted and for loans made. We deem the transaction within the terms of the statute. It would be extremely technical to hold that the bank had no right to take a deed in form, but a mortgage in equity, to secure a past indebtedness as well as contemplated advances.

It is contended by the appellants that the deed found to be a mortgage gave the plaintiff no lien upon any property for

advances <sup>244</sup> made to Tufts after its execution and delivery. The claim is made that a mortgage for future advances is not operative as a lien therefor unless the mortgage is given for a fixed sum, which may include future advances, or the mortgage recites that it is given to cover future advances. This would be true of a mortgage in form and terms: *Union Nat. Bank v. Moline, Milburn & Stoddard Co.*, 7 N. Dak. 201, 73 N. W. 527. This principle is not applicable to the case at bar. The plaintiff had a deed absolute in form, but intended by the parties to be a mortgage only. The deed was recorded as a deed, and taken by plaintiff as security for all existing debts and future advances. It was taken in good faith, and the advancements made under it in good faith in reliance on the deed as security. The plaintiff made no advancements after it had notice that appellants had a judgment against Tufts; hence the appellants have not been damaged in any way nor misled in the matter. They obtained their judgments after the deed was recorded, and until they obtained their judgments the plaintiff was under no obligation to them. Such a transfer of real property is not fraudulent as a matter of law. The transaction involved no secret trust in favor of the grantor. It was not an absolute sale or transfer under which Tufts was to benefit as against his creditors. It was a good faith agreement under which he was to be paid money as he needed it, for which the deed was to remain as security. There is no evidence in the case showing the value of the section of land conveyed, and therefore nothing to show that Tuft's equity in the land was after payment of the prior mortgage of \$8,000, and what was due the plaintiff. The deed is not attacked as fraudulent as a matter of fact or as a matter of law by pleading or assignments. The great weight of authority sustains the proposition that a deed or mortgage given to cover future advances is not fraudulent as a matter of law. The case of *Newell v. Wagness*, 1 N. Dak. 62, 44 N. W. 1014, is not in point under the facts of this case. In that case a bill of sale of a large stock of goods was sold to the plaintiff by a bill of sale absolute on its face. The facts showed that the buyer and seller had secretly agreed that the buyer should dispose of the stock of goods and turn over the proceeds after repayment of the plaintiff's indebtedness to the seller. The necessary and inevitable tendency of that transaction would be

to delay the other creditors of the financially embarrassed seller. In the case at bar there was no secret reservation on behalf of the mortgagor, except as to reconveyance after the indebtedness was <sup>245</sup> paid, and that will not avoid the conveyance as constructively fraudulent. As said in *McClure v. Smith*, 14 Colo. 297, 23 Pac. 786: "But if there be a bona fide debt for which the security is given; if there be no understanding with the mortgagee to hold the overplus, or to hold the property after payment of his debt, secretly, for the benefit of the mortgagor; if there be no collusion on the part of the mortgagee with the mortgagor in keeping the defeasance unrecorded, or in keeping secret the exact nature of the transaction, for the purpose of deceiving creditors; in short, if the mortgagee is simply endeavoring in good faith to obtain that precedence in the security of his debt which the law permits—the mere isolated fact that he takes an absolute deed instead of a mortgage will not, in and of itself alone, render his lien nugatory. The law prescribes no absolute and inflexible form for mortgages upon realty": See, also, *Jones on Mortgages*, sec. 243; *Wilson v. Russell*, 13 Md. 494, 71 Am. Dec. 645; *Dummer v. Smedley*, 110 Mich. 466, 68 N. W. 260, 38 L. R. A. 490; *Clement v. Hartzell*, 57 Kan. 482, 46 Pac. 961; *In re Johnson*, 20 R. I. 108, 37 Atl. 531.

It follows, therefore, that the plaintiff, as between it and Tufts would be entitled to enforce its mortgage lien for all advances made pursuant to the agreement for such advances. The defendants, appearing as judgment creditors of Tufts, are entitled to no more rights than would be accorded to Tufts. Their liens are subsequent to the mortgage liens. It is well established that before a grantor of a deed absolute on its face, but intended as mere security, can compel a reconveyance to him, he must pay all of the indebtedness due the grantee pursuant to the agreement made for such reconveyance. Such reconveyance is decreed upon equitable grounds and in a court of equity. Having asked a court of equity to decree a reconveyance, he must himself do equity, and pay all that he contracted to pay when the conveyance was made: 11 Am. & Eng. Ency. of Law, p. 330; *Jones on Mortgages*, secs. 336, 1079, and cases cited; *Carpenter v. Plagge*, 192 Ill. 82, 61 N. E. 530; *Mahoney v. Bostwick*, 96 Cal. 53, 31 Am. St. Rep. 175, 30 Pac. 1020; *Upton v. National*

Bank of South Reading, 120 Mass. 153; *Brooks v. Brooks*, 169 Mass. 38, 47 N. E. 448. Before the lien of the judgment creditors can be realized upon out of the land, they must do what Tufts would have to do, and are in no better position than he would be in were he asking for a reconveyance.

<sup>246</sup> We now come to the question, raised as an issue by the pleadings, as to whether the judgment creditor can compel the plaintiff to exhaust its chattel security and apply the proceeds thereof in satisfaction of its entire indebtedness. The facts as hitherto outlined show that the plaintiff had chattel security and real estate security for the same indebtedness. The judgment creditors have a lien upon the real estate only. The evidence does not show the value of the land nor of the chattel security. This is immaterial in this case, as the judgment creditors are asking only that the proceeds of the chattel security be applied on the indebtedness. Plaintiff resists the claim upon the ground that it had purchased the property on which it held the chattel mortgage, and that it had the right to dispose of the personal property without regard to the rights of the judgment creditors. It will be observed that the plaintiff purchased this property after this suit was commenced, and after the judgment creditors had answered and set forth their judgments and prayed that the plaintiff be compelled to satisfy its claim out of the chattel security. In place of so doing, as far as it could be done, the plaintiff has ignored its chattel mortgage, and purchased the personal property mortgaged and sold it at private sale, and has not accounted for the proceeds in satisfaction of the indebtedness. It is clear to us that such a proceeding cannot be sustained as against the rights of the judgment creditors. It would be inequitable to deprive these creditors of the right to participate in the just distribution of the Tufts property in satisfaction of the liens thereon in the order of their priority. It is generally established that a creditor holding liens on different property will not be permitted to satisfy his lien out of the property to the prejudice of a creditor having a lien on part of that property only after actual or constructive notice of such inferior lien. In this case, actual notice of the lien of the judgment creditors was imparted by the answer in this case. This principle is not to be applied if the senior lienholder will be prejudiced in any manner. The general principle is well

stated in *Burnham v. Citizens' Bank*, 55 Kan. 545, 40 Pac. 912: "The general rule enforced in equity is that where one creditor is secured by mortgage on several pieces of property while another creditor is secured by a junior mortgage on only a part of the property, the prior creditor, when chargeable with the actual notice of the rights of the junior creditor, is bound to exhaust his security on the property not covered by the junior lien, and that he must account to the junior <sup>247</sup>lienholder if he releases his security on or pays over to the mortgagor the proceeds of the property not covered by the lien of the junior mortgagee after actual notice of the junior lien." Section 4690 of the Revised Codes of 1899, announces in explicit terms the same principle: See, also, *Pomeroy's Equity Jurisprudence*, sec. 1414, and cases cited; *Meacham v. Steele*, 93 Ill. 135; *Dewey v. Ingersoll*, 42 Mich. 17, 3 N. W. 235; *Jordan v. Hamilton County Bank*, 11 Neb. 499, 9 N. W. 654; *Kendall v. Woodruff*, 87 N. Y. 1; *Ingalls v. Morgan*, 10 N. Y. 178.

In this case the defendants have asked only that the proceeds of the sale of the mortgaged chattels be applied on plaintiff's debt, and not that the plaintiff's lien on the land be postponed to the extent of the money realized on the sale of the chattels. Their contention that such money should be applied as a payment on the debt is equitable, and is allowed at the sum of \$2,369.03. The property covered by plaintiff's mortgage not sold, as herein stated, should also be sold under foreclosure proceedings, and the proceeds applied on plaintiff's debt, less costs and expenses of foreclosure.

Plaintiff contends that it is entitled to be allowed a deduction on the \$2,369.03 of the sum of \$600 paid to Lathrop for the property. In view of defendants' rights, as known by plaintiff, the payment of this sum as purchase money was unauthorized and in defiance of defendants' equitable rights, and should not be allowed as a credit.

It is also claimed by plaintiff that it is entitled to an allowance of the expense of keeping the chattel mortgaged property. It did not foreclose under its mortgage. It simply purchased the property and ignored its mortgage, and is not entitled to any expenses upon any ground.

Plaintiff paid taxes on the land to protect its lien, and also paid interest on the \$8,000 prior mortgage for the same

purpose. The trial court allowed it credit for such payments, and such action was proper under the statute and upon equitable principles: Rev. Codes 1899, secs. 1277, 4676. This was beneficial to the defendants, and they have no just grounds for complaint on that ground: *Foster v. Furlong*, 8 N. Dak. 282, 78 N. W. 986.

In this case the defendants ask that the proceeds of the sale of the property be applied on Tuft's indebtedness. They thereby acquiesced in that sale, so far as the amount realized therefrom, and are content with credit for that sum on the total of Tuft's indebtedness, found by the court to be \$10,549 in the aggregate. The <sup>248</sup> sum of \$2,369.03 will be allowed as a payment on the total indebtedness as of the day of the sale. Were it not for the fact that part of the personal property is still subject to plaintiff's chattel mortgage, final judgment would be ordered by this court. But the case must be remanded for further proceedings in reference to the property undisposed of.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion; costs to be in favor of the appellants.

All concur.

#### MORTGAGES TO SECURE FUTURE ADVANCES.

##### I. Validity, 690.

##### II. Priority Between and Other Liens.

- a. When Other Liens Attach Before Making Advances, 691.
- b. Advances Made After Actual Notice of Other Liens, 691.
- c. Advances Made Without Notice of Subsequent Liens, 692.
- d. Notice of Subsequent Liens Dependent on the Registry Act Only, 692.
- e. Marshaling Securities, 694.

##### III. Form of.

- a. Necessity for Specifying that Future Debts are to be Secured by, 695.
- b. Necessity for Specifying the Limit of the Sum to be Secured, 695.
- c. Of the Agreement to Make Advances and the Necessity of Expressing It in the Mortgage, 695.

##### I. Validity.

A mortgage to secure future advances is valid not only between the parties, but also with respect to third persons who deal with the land to secure liens thereon: *Forsyth v. Preer*, 62 Ala. 443; *Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641; *Nelson's Heirs v. Boyce*, 7 J. J. Marsh. 401, 23 Am. Dec. 411; *Bunker v.*



Baron, 93 Me. 87, 44 Atl. 372; Taft v. Stoddard, 142 Mass. 545, 8 N. E. 586; Wilson v. Russell, 13 Md. 495, 71 Am. Dec. 645; Citizens' Saving Bank v. Kock, 117 Mich. 225, 75 N. W. 458; Summers v. Roos, 42 Miss. 749, 2 Am. Rep. 653; Bank of Utica v. Finch, 3 Barb. Ch. 293, 49 Am. Dec. 175; Union National Bank v. Melburn & Stoddard Co., 7 N. Dak. 201, 73 N. W. 527. In some of the states, however, this rule has been, or at least was at one time, abrogated by statute, but even there if the mortgage is given for a sum consisting partly of existing indebtedness and partly of indebtedness to be paid in the future, it is void only as to the latter and valid as to the former: New Hampshire Bank v. Willard, 10 N. H. 210; Johnson v. Richardson, 38 N. H. 353; Woods v. People's Nat. Bank, 83 Pa. 57.

## II. Priority Between and Other Liens.

a. **When Other Liens Attach Before Making Advances.**—When other liens are affixed to the land intermediate to the execution and recording of the instrument and the making of some of the future advances, there is an almost irreconcilable conflict of authorities as to whether the mortgage is a first lien as to all advances, or only as to those made before the second encumbrance has fastened itself upon the property. Under the old English rule as laid down in *Gordon v. Graham*, 7 Vin. Abr. 52, 2 Eq. Cas. Abr. 598, a mortgage for future advances was a first lien on the property as to all advances secured by the mortgage, no matter when made, and this without reference to the question whether the mortgagee was obligated by contract to make further advances or whether he then knew of the inferior lien. Subsequently, however, this ruling was declared unsound by the house of lords in *Hopkinson v. Holt*, 9 H. L. Cas. 14, and it was held that where the mortgagee had notice of the subsequent lien, the mortgage was inferior as to advances made subsequent to such notice. Some American authorities lean toward the old English rule: *Rowan v. Sharp's Rifle Mfg. Co.*, 29 Conn. 282; *Brinkmeyer v. Browneller*, 55 Ind. 487; *Brinkmeyer v. Helbing*, 57 Ind. 435; *Wilson v. Russell*, 13 Md. 495, 71 Am. Dec. 645; *Witczinski v. Everman*, 51 Miss. 841.

b. **Advances Made After Actual Notice of Other Liens.**—A majority of the decisions follow the later English decision in the *Hopkinson* case, and hold that a subsequent lien will take precedence over the mortgage as to all advances made after the mortgagee had notice of the prior encumbrance: *Lanahan v. Lawton* (N. J. Eq.), 23 Atl. 476; *Truscott v. King*, 6 Barb. 346; *Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641; *Shirras v. Caig*, 7 Cranch, 34, 3 L. ed. 260; *Frye v. Bank of Illinois*, 11 Ill. 367; *Ward v. Cooke*, 17 N. J. Eq. 93; *Central Trust Co. v. Continental Iron Works*, 51 N. J. Eq. 605, 40 Am. St. Rep. 539, 28 Atl. 595; *Ackerman v. Hunsecker*, 85 N. Y. 43, 39 Am. Rep. 621; *Reynolds v. Webster*, 24 N. Y. Supp. 1133; *Union Nat. Bank of Oshkosh v. Melburn & Stoddard Co.*,

7 N. Dak. 201, 73 N. W. 527; Wisconsin Planing Mill Co. v. Schna, 72 Wis. 277, 39 N. W. 558.

c. **Advances Made Without Notice of Subsequent Liens.**—All the adjudications appear to agree that in the absence of notice of the subsequent lien the holder of the security for future advances may treat the property as free from subsequent encumbrances, and can safely make further loans, his prior equity under the mortgage being superior to the subsequent equity of one who holds the later lien as to all advances made in ignorance of such subsequent encumbrance, whether made before or after it attaches. But whether this notice should be actual, or whether constructive notice by registering the inferior lien is sufficient, is a matter upon which the authorities seem unable to agree.

d. **Notice of Subsequent Liens Depending on the Registry Acts Only.**—Many cases hold that record notice of the inferior lien will not suffice to debar the mortgagee of his right to priority as to advances made subsequent to such notice; that before the mortgagee can be deprived of his superior equity actual notice of the second encumbrance must be brought to his knowledge: *Truscott v. King*, 6 Barb. 346; *Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 283, 19 Pac. 641; *Savings etc. Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922; *Crane v. Deming*, 7 Conn. 387; *Rowan v. Sharp's Rifle Mfg. Co.* 29 Conn. 282; *Shirras v. Caig*, 7 Cranch, 34, 3 L. ed. 260; *Frye v. Bank of Illinois*, 11 Ill. 367; *Livingston v. McInlay*, 16 Johns. 165; *Nelson's Heirs v. Boyce*, 7 J. J. Marsh. 401, 23 Am. Dec. 411; *Bunker v. Baron*, 93 Me. 87, 44 Atl. 372; *Burdett v. Clay*, 8 B. Mon. 287; *Wilson v. Russell*, 13 Md. 535, 71 Am. Dec. 645; *Emons v. Craashaw*, 1 McCord Eq. 252; *Griffin v. New Jersey Oil Co.*, 11 N. J. Eq. 49; *Ward v. Cook*, 17 N. J. Eq. 93; *Williams v. Gilbert*, 37 N. J. Eq. 84; *Central Trust Co. v. Continental Iron Works*, 51 N. J. Eq. 605, 40 Am. St. Rep. 539, 28 Atl. 595; *Robinson v. Williams*, 22 N. Y. 330; *Ackerman v. Hunsecker*, 85 N. Y. 43, 39 Am. Rep. 621; *Reynolds v. Webster*, 24 N. Y. Supp. 1133; *Union Nat. Bank v. Melburn & Standard Co.*, 7 N. Dak. 201, 73 N. W. 527; *Pennock v. Copeland*, 1 Phila. 29; 1 Jones on Mortgages, sec. 372; 3 Pomeroy's Equity Jurisprudence, par. 1199.

In section 372 of Jones on Mortgages it is stated: "A prior mortgagee is affected only by actual notice of a subsequent mortgage, and not by constructive notice for the recording of the second mortgage and for all advances made prior to his receiving such notice of a subsequent encumbrance his mortgage is a valid security. So where a party mortgaged land to secure a present loan and also future advances, and afterward declared a homestead upon it and subsequently obtained further advances upon the same land from the first mortgagee without disclaiming his homestead, the mortgagee was protected after such advances, the recording of the declaration of homestead not being notice to the prior mortgagee."

All of the above cases seem to have been decided upon the theory that the mortgage as against subsequent encumbrances becomes a lien for the whole sum advanced from the time of its execution and record, and not for each separate amount advanced from the time of such advancement.

In the California cases hereinbefore cited it is held that actual notice of the subsequent encumbrance is necessary in order to deprive the mortgage of its superiority, notwithstanding the fact that no specified sum was named in the mortgage as to what future advances it was intended to secure, the court reasoning that the recitals in the mortgage were sufficient to put a subsequent encumbrancer on notice of probable future dealings between the parties affecting the mortgaged property, and that the duty of investigating the extent of liability that might attach to the property by reason of the mortgage devolved upon the holder of the inferior lien. To the same effect is the case of *Witezinski v. Everman*, 51 Miss. 841, where the court said: "A mortgage to secure future advances which on its face gives information as to the extent and purpose of the contract so that a purchaser or junior creditor may, by an inspection of the record or by *ordinary diligence and common prudence* [the italics are ours], ascertain the extent of the encumbrance, the mortgage will prevail."

In *Central Trust Co. v. Continental Iron Works*, 51 N. J. Eq. 605, 40 Am. St. Rep. 539, 25 Atl. 595, it was held that a mortgage for future advances took precedence over a mechanic's lien which attached prior to future advances because no actual notice of the lien had been given, its recording not being sufficient.

A no less formidable array of authorities holds that recording the instrument creating the latter lien or the docketing of a subsequent judgment constitutes a constructive notice to the mortgagee, so that all advances made thereafter are deemed to have been made with knowledge of the existence of the inferior lien, and that therefore the mortgage becomes a lien only from the time that such advances were made: *Parker v. Jacoby*, 3 Grant Cas. 300; *Ketcham v. Wood*, 22 Hun, 64; *Freye v. Bank of Illinois*, 11 Ill. 367; *Collins v. Carlile*, 13 Ill. 254; *Iadue v. Detroit & Milwaukee R. R. Co.*, 13 Mich. 380, 87 Am. Dec. 759; *Stone v. Walling*, 14 Mich. 514; *Spader v. Lawler*, 17 Ohio, 371, 49 Am. Dec. 461; *Nicklin v. Betts Spring Co.*, 11 Or. 406, 50 Am. Rep. 477, 5 Pac. 51; *Appeal of Bank of Montgomery Co.*, 36 Pa. 170; 3 *Pomeroy's Equity Jurisprudence*, 2d ed., 1831, note 1; 1 *Washburn on Real Property*, 542.

These decisions are based upon the theory that a mortgage is purely a legal instrument; that there is no such thing as an equitable mortgage—i. e., a sleeping or contingent mortgage; that a mortgage is only security for the payment of money, and when there was no money due there could be no mortgage, and hence a mortgage

could have no effect as to third parties unless its record disclosed what amount it actually secured.

In *Ladue v. Detroit & Milwaukee R. R. Co.*, 13 Mich. 380, 87 Am. Dec. 759, the court said: "The instrument can only take effect as a mortgage or encumbrance at the time when some debt or liability shall be created, or some binding contract is made which is to be secured by it. Until this takes place neither the land nor the parties nor third persons are bound by it. It constitutes of itself no binding contract; either party may disregard or repudiate it at pleasure; it is but a part of an arrangement merely contemplated as probable which can be rendered effectual by future consent and further acts of the parties. It is but a kind of conditional proposition, neither binding nor intended to bind either of the parties until subsequently assented to or adopted by both."

As to the inconvenience which is supposed to result to the first mortgagee in examining the record before making further advances, the opinion continues: "It is at most the same inconvenience to which all parties are compelled to submit when they lend money on the security of real estate—the trouble of looking to the value of the security, but, in truth, the inconvenience is very slight. Under any rule or decision they would be compelled to look to the record title when the mortgage is originally taken; at the next advance they have to look back to this period, and for any future advance only back to the last, which would generally be but the work of a few minutes, a much less inconvenience than they have to submit to in their ordinary daily business, in making inquiries as to the responsibility, the signatures and identity of the parties to a commercial paper. But if there be any hardship, it is one which they can readily overcome by agreeing to make the advances; in other words, entering into some contract for the performance of which by the other party the mortgage may operate as security. They can hardly be heard to complain of it as a hardship that the courts refuse to give them the benefit of a contract, which from prudential or other considerations they were unwilling to make or did not make until the rights of other parties have intervened. Courts can give effect only to contracts the parties have made and from the time that took effect."

**e. Marshaling Securities.**—Where future advances are secured by more than one mortgage, and an encumbrance subsequently attaches in favor of a third party on the security covered by one of the mortgages only, the mortgagee must protect the equity of the second encumbrancer by getting his money, if possible, out of the property not covered by the inferior lien; and if he releases any of his security after the second lien attaches, he is accountable for the actual value of the property in the adjustment of the equities of the parties with regard to the property on which they both have liens. This seems an elementary principle, but see *Union Nat. Bank of*

Oshkosh v. Melburn & Stoddard Co., 7 N. Dak. 201, 73 N. W. 527; Gotzian & Co. v. Shakman, 89 Wis. 52, 61 N. W. 304; 4 Pomeroy's Equity Jurisprudence, sec. 1414.

### III. Form of.

a. **Necessity for Specifying that Future Debts are to be Secured by.**—According to the weight of authority, a mortgage to secure future advances may, without impairing its validity, be in the same form as if it were to secure pre-existing indebtedness. In a few of the states, the fact that the mortgage is given to secure future advances must be stated, but the decided weight of authority opposes this view. If the mortgage discloses the amount intended to be secured thereby, parol evidence is generally admissible to identify the debts, and such evidence, if satisfactory, may extend the protection of the mortgage over indebtedness created after its execution, but intended by the parties thereto to be secured thereby: *Lovelace v. Webb*, 62 Ala. 271; *Kirby v. Raynes*, 138 Ala. 194, 100 Am. St. Rep. 39, 35 South. 118; *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102; *Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641; *Bacon v. Brown*, 19 Conn. 29; *Foster v. Reynolds*, 38 Mo. 553; *Griffin v. New Jersey Oil Co.*, 11 N. J. Eq. 49; *Bank of Utica v. Finch*, 3 Barb. Ch. 293, 49 Am. Dec. 175; *Hall v. Crouse*, 13 Hun, 557; *Lyle v. Ducomb*, 5 Binn. 585. A few authorities declare to the contrary: *Westcott v. Gunn*, 4 Duer, 111; *Divver v. McLaughlin*, 2 Wend. 596, 20 Am. Dec. 655; *McGavock v. Deery*, 1 Cold. 265. It is doubtful whether the cases last above cited from the courts of New York represent the law as now understood in that state.

b. **Necessity for Specifying the Limit of the Sum to be Secured.**—The authorities are perhaps more evenly divided upon this question than upon any other connected with the topic here under consideration. It would seem quite reasonable, both for the purpose of preventing fraud as well as of enabling persons about to deal with property to know to what extent it is encumbered, that every mortgage should specify the amount intended to be secured thereby, and, hence, that a mortgage which merely declares that it is to secure such advances as shall thereafter be made by the mortgagee to the mortgagor, or such indebtedness as shall thereafter arise between them, should be held invalid either as against the policy of the law or as constituting evidence of fraud: *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102; *Pettibone v. Griswold*, 4 Conn. 158, 10 Am. Dec. 106; *Garber v. Henry*, 7 Watts, 57. A slight preponderance of the authorities, however, dissents from this view: *Jarratt v. McDaniel*, 32 Ark. 598; *Allen v. Lathrop*, 46 Ga. 133; *Michigan Ins. Co. v. Brown*, 11 Mich. 265; *Witezinski v. Everman*, 51 Miss. 841; *Robinson v. Williams*, 22 N. Y. 380.

c. **Of the Agreement to Make Advances and the Necessity of Expressing It in the Mortgage.**—The better view, and one from which

we think there is practically no dissent, is, that the only future advances which can be secured by a mortgage must rest upon indebtedness which the mortgagee has assumed some obligation to permit to be created, and, hence, that the mortgage will not secure indebtedness subsequently assigned to the mortgagee, and which neither of the parties contemplated he should hold when the mortgage was executed: *Provident M. B. L. Assn. v. Shaffer*, 2 Cal. App. 216, 82 Pac. 274. In the absence of any statute of frauds declaring otherwise, there is no reason why the agreement upon the part of the mortgagee may not be oral as well as in writing (*Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641), but where the agreement is oral, it seems to be in effect abrogated by the creation of subsequent encumbrances without the knowledge of it, and after the mortgagor has executed subsequent conveyances and encumbrances, the mortgagee seems to be no longer at liberty to make advances or permit the incurring of indebtedness upon the parol agreement that the amount thereof shall be secured by the mortgage: *Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641; *Central Trust Co. v. Continental I. W.*, 51 N. J. Eq. 635, 40 Am. St. Rep. 539, 28 Atl. 595; *Wagner v. Breed*, 29 Neb. 720, 46 N. W. 286; *Merchants' State Bank v. Tufts*, 14 N. Dak. 238, ante, p. 682, 103 N. W. 760. For the purpose of authorizing the mortgagee to continue advances after the mortgagor has conveyed the property or created other encumbrances, we apprehend that it is necessary for the mortgage itself to show the existence of the agreement, or, in other words, to establish the obligation on the part of the mortgagee to permit the creation of the indebtedness in the future which he claims to be secured by the mortgage: *Pettibone v. Griswold*, 4 Conn. 158, 10 Am. Dec. 106; *Balch v. Chaffee*, 73 Conn. 318, 84 Am. St. Rep. 155, 47 Atl. 327.

Owing to the conflict of authorities regarding mortgages to secure future advances, the only safe conclusions which can be drawn may be stated as follows:

1. That when the mortgagee is obligated by contract to make future advances, his lien as to all the advances will be superior to subsequent liens, whether the subsequent liens may have attached either before or after such advances were made, and without regard to whether the mortgagee had notice or not of the existence of such subsequent encumbrances, either before or after making future advances.

2. That if the contract for future advances was only optional, the lien of the mortgagee would be superior only as to such advances as were made before he had notice, either actual or constructive, that any subsequent lien had attached.

## FRIEDLANDER v. TAINTOR.

[14 N. Dak. 393, 104 N. W. 527.]

**MECHANICS' LIENS—Architects.**—If an architect not only draws the plans, but also superintends the construction of the building under a contract with the owner, he is entitled to a mechanic's lien, and this under statutes which merely give such lien in general terms for work and labor furnished in the erection of a building. (p. 698.)

E. S. Peterson, for the appellant.

G. C. H. Corliss, for the respondent.

<sup>395</sup> YOUNG, J. The plaintiff brought this action to foreclose a mechanic's lien upon a certain two-story store and office building situated in the city of Park River. The findings and judgment of the trial court were in plaintiff's favor. The defendant has appealed from the judgment, and assigns error upon the judgment-roll proper.

The trial court found, among other things, that the plaintiff furnished plans and specifications for, and superintended the construction of, said building, pursuant to a contract with the defendant, under the terms of which the plaintiff was to be paid for his services three per cent of the cost of the building. The appeal presents but a single question. The plaintiff is an architect, and the lien involved in this case is for his services in drawing plans and specifications and supervising the construction of the building upon which the lien is claimed. The defendant contends that such service will not support a lien under our statute. This contention cannot be sustained. Section 4788 of the Revised Codes of 1899 declares that "any person who shall perform any labor upon . . . any <sup>396</sup> building or other structure upon land . . . under a contract with the owner of such land, . . . shall . . . have for his labor done . . . a lien upon such building." The statute does not designate the persons who are entitled to liens under it by name or occupation. Its language is general. "Any person" who otherwise comes within its provisions is entitled to a lien. It includes all persons who perform "any labor upon any . . . building." It is urged that the services of an architect in drawing plans and specifications and supervising the construction cannot be said to be labor upon the build-

ing. This question is not a new one to the courts, and it has been held with great unanimity that where the architect not only draws the plans, but superintends the construction, he is entitled to a lien; and this under statutes which merely give a lien in general terms for work and labor furnished in the erection of a building: *Boisot on Mechanics' Liens*, sec. 116; *Phillips on Mechanics' Liens*, sec. 158; also *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262, overruling *Stryker v. Cassidy*, 10 Hun, 81. See, also, *Rinn v. Electric Power Co.*, 3 App. Div. 305, 38 N. Y. Supp. 345; *Knight v. Norris*, 13 Minn. (Gil. 438) 473; *Gardner v. Leck*, 52 Minn. 522, 54 N. W. 746; *Mutual Benefit Life Ins. Co. v. Rowland*, 26 N. J. Eq. 389; *Bank of Pennsylvania v. Gries*, 35 Pa. 423; *Hughes v. Torgerson*, 96 Ala. 346, 11 South. 209, 38 Am. St. Rep. 105, 16 L. R. A. 600; *Taylor v. Gilsdorff*, 74 Ill. 354; *Von Dorn v. Mengedoht*, 41 Neb. 525, 59 N. W. 800; *Field & Slocomb v. Consolidated M. W. Co.*, 25 R. I. 319, 105 Am. St. Rep. 895, 55 Atl. 757; *Johnson v. McClure*, 10 N. Mex. 506, 62 Pac. 983; *Persons v. Brown*, 97 Iowa, 699, 66 N. W. 880; *Phoenix Furniture Co. v. Put-in-Bay Hotel Co. (C. C.)*, 66 Fed. 683; *Arnoldi v. Gouin*, 22 Grant Ch. 314; *Mulligan v. Mulligan*, 18 La. Ann. 20. Our statute gives a lien for labor "upon" the building, but we do not regard this language as peculiar, or requiring a difference in construction. The Alabama statute uses the same language, and the court, in *Hughes v. Torgerson*, 96 Ala. 346, 38 Am. St. Rep. 105, 11 South. 209, 16 L. R. A. 600, sustained the lien of a supervising architect. "Are such services by an architect 'work or labor upon . . . a building or improvement on land,' within the meaning of the statute? Code, sec. 3018. It is plain that a contractor for the construction of the building is within the protection of the statute. If he was also intrusted with the planning of the building, and with the sole supervision of its erection, we think it equally plain that his services in these particulars could be regarded as properly a part of his work 'upon the building,' and that compensation therefor might be included in the <sup>397</sup> amount for the security of which he could acquire a lien under the statute. Under a New York statute a lien was authorized in favor of 'any person who shall perform any labor or furnish any materials in building, alter-



ing or repairing any house,' etc., 'by virtue of any contract with the owner,' etc. 'This language,' it was said in *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262, 'is general and comprehensive, and its natural and plain import includes all persons who perform labor in the construction or reparation of a building, irrespective of the grade of their employment or the particular kind of service. The architect who superintends the construction of a building performs labor as truly as the carpenter who frames it, or the mason who lays the walls; and labor of a most important character. . . . The language quoted makes no distinction between skilled and unskilled labor, or between mere manual labor and the labor of one who supervises, directs and applies the labor of others. The general principle upon which the lien laws proceed is that any person who has contributed by his labor or by furnishing materials to a structure erected by an owner upon his premises shall have a claim upon the property for his compensation.' The claim of an architect was allowed in that case. What was there said seems eminently sound, and is equally applicable to the Alabama statute. An architect who prepares the drawings, plans and specifications for a building, and superintends the erection thereof, may as truly be said to perform labor thereon as anyone who takes part in the work of construction. That he is within the protection of the statute is a proposition well supported by adjudications upon other similar statutes." Some courts have held that an architect is not entitled to a lien even when his services cover both furnishing of plans and the supervision of construction: See *Raeder v. Bensberg*, 6 Mo. App. 445; *Foushee v. Grigsby*, 12 Bush, 75. The weight of authority and reason, as already stated, is against this view. There is a sharp conflict in judicial opinion as to whether an architect who merely furnishes plans and specifications is entitled to a lien. Upon this we express no opinion. The plaintiff's contract in this case included the supervision of the construction, and under the rule of construction adopted by the great majority of the courts under the same or similar statutes to which we give our adherence he was entitled to the lien.

Judgment affirmed.

All concur.

*An Architect Who Prepares the Plans* and specifications for a building, and supervises the erection thereof, is generally regarded as entitled to a mechanic's lien: *Hughes v. Torgenson*, 96 Ala. 346, 38 Am. St. Rep. 105; *Field v. Consolidated Mineral Water Co.*, 25 R. I. 319, 105 Am. St. Rep. 895; *Fitzgerald v. Walsh*, 107 Wis. 92, 81 Am. St. Rep. 824. In Massachusetts, an architect is entitled to a lien for his services upon a building for supervising the work of construction, but not for preparing plans and specifications: *Mitchell v. Packard*, 168 Mass. 467, 60 Am. St. Rep. 404. In Tennessee, a supervisory architect employed to draw plans and specifications, solicit bids for, and supervise the construction of a building, is not entitled to a lien thereon: *Thompson v. Baxter*, 92 Tenn. 305, 36 Am. St. Rep. 85.

### VALLELY v. FIRST NATIONAL BANK.

[14 N. Dak. 580, 106 N. W. 127.]

**RECORDING LAWS—General Creditors.**—If a statute declares that a grant of real property absolute in form but intended to be defeasible, "is not defeated or affected as against any other person than the grantee or persons having actual notice, unless an instrument of defeasance duly executed and acknowledged shall have been recorded," the term "any other person" means any person otherwise entitled to the protection of the recording laws, such as subsequent purchasers or encumbrancers, and does not include general creditors who are not protected against an unrecorded defeasance. (p. 703.)

C. F. Templeton, for the appellant.

Gray & Casey, for the respondents.

**582 YOUNG, J.** The plaintiff brought this action to determine adverse claims to one hundred and sixty acres of land situated in Walsh county. The complaint, which is in the statutory form, alleges that the plaintiff is the owner of the premises, and that the defendants claim certain estates or interests in or liens or encumbrances upon the same adverse to the plaintiff, and prays that they be required to set them forth and that their validity and priority be determined. The defendants answered, setting out their several claims to the premises. The issues presented by the answers were fully covered by the findings. The trial court found that the plaintiff is the owner of the premises free from all liens and encumbrances claimed by the defendants, except a mortgage for twelve hundred and ten dollars in favor of the defendant Harris, the validity of which was confirmed. In all other respects the findings were adverse

to the defendants. The plaintiff has appealed from the judgment, and assigns error upon the judgment-roll.

It is contended that the trial court erred in sustaining the Harris mortgage. The facts essential to a review of this question are as follows: On December 20, 1889, the land in question was owned by one Honore Savard. On that date Savard and wife executed and delivered a conveyance of the same to one Joseph Deschenes, <sup>583</sup> which conveyance, although in form a warranty deed, was given for security, and was, as between the parties, a mortgage. No written defeasance was executed, acknowledged and recorded. On December 12, 1900, Deschenes was adjudged a bankrupt, and one R. B. Griffith was made trustee. Savard had paid to Deschenes his entire indebtedness prior to the latter's failure. On March 25, 1901, Griffith, as trustee, executed and delivered a deed of the premises to the plaintiff. On December 10, 1901, Savard gave his promissory note to the defendant, C. A. Harris, for twelve hundred and ten dollars, and gave a mortgage upon the premises in question to secure it. The note was given for a pre-existing indebtedness which Savard owed to the defendant bank, and both the note and the mortgage were for the bank's benefit. Subsequently, and on April 15, 1903, Savard executed a quitclaim deed of the premises to the plaintiff. All of the instruments referred to were recorded at or about the date of their execution. The plaintiff had actual notice when he purchased from the trustee that the conveyance to Deschenes was for security. Both Harris and the bank had actual notice of the trustee's deed to the plaintiff when the mortgage to Harris was executed by Savard. It does not appear that Deschenes' creditors had actual notice that the conveyance which he had received from Savard was other than what it purported to be—i. e., an absolute conveyance.

From these facts the trial court found that the Harris mortgage is a valid lien. There is no question as to the correctness of the finding that the plaintiff has the legal title of the premises, and this is true, whether Savard's conveyance to Deschenes be given effect either as an absolute conveyance of title or a mortgage merely creating a lien; for, as already stated, the plaintiff holds under two deeds, one from Savard, who concededly was the owner prior to

his conveyance to Deschenes, and the other from Deschenes' trustee in bankruptcy, who had succeeded to whatever right or title the bankrupt had in the premises. The plaintiff owns the legal title in any event. The only question is whether it is subject to the Harris mortgage, and this, it will be seen, depends entirely upon the effect to be given to Savard's conveyance to Deschenes. If it be held valid and effective as a conveyance of title, it follows that the mortgage subsequently executed by Savard to Harris does not constitute a lien. But if, on the other hand, it be given effect for what it really was, as between the parties, a mere mortgage,<sup>584</sup> and not a conveyance of title, in that event, the legal title remained in Savard, his mortgage to Harris creating a valid lien, and was properly sustained by the trial court. It is conceded that the trustee did not in fact acquire title to the premises through Deschenes; and this must be true, for Deschenes had no title to which he could succeed. He merely had a lien, and this had been discharged prior to the trustee's appointment. But the appellant's position is that the trustee succeeded, not only to the rights of the bankrupt, but also to the rights of the creditors of the bankrupt, and that as to them, and therefore as to him as their representative, the true nature of Savard's conveyance to the bankrupt cannot be shown, but must be held to be what it purports to be, i. e., an absolute conveyance of title. If this view be sustained, it is apparent that the trustee's deed was effective as a conveyance of title, and the Harris mortgage is a nullity. In our opinion this contention cannot be sustained. It is based upon section 4730 of the Revised Codes of 1899, which reads as follows: "When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated as against any person other than the grantee or his heirs or devisees or persons having actual notice, unless an instrument of defeasance duly executed and acknowledged shall have been recorded in the office of the register of deeds of the county where the property is situated."

It is contended that under the terms of this section a general creditor has a right to stand upon the form of a conveyance executed to his debtor regardless of its true

nature, when a defeasance has not been executed, acknowledged and recorded as required by the above section, and that as to him it cannot be defeated or affected. The crucial question is whether creditors are within the protection extended by this section. It is clear to us that they are not. The purpose of the section is to declare the consequences which will follow the failure to execute and record a defeasance in connection with a conveyance which is absolute in form, but is intended to be defeasible. The result is that the conveyance shall not be defeated or affected "as against any other person than the grantee or his heirs or devisees or persons having actual notice." Grantees, heirs, devisees and persons having "actual notice" are in express terms excluded from the protection of this section, and it is declared that as to "any person other than" those excepted the <sup>585</sup> conveyance "is not defeated or affected," unless a defeasance is "executed, acknowledged and recorded." Counsel for appellant contend that in construing this section "we must give the language used its ordinary meaning, except where words and phrases have been interpreted by the legislature," and that, observing this statutory rule, "an absolute grant, though intended merely as security, can no more be defeated as against creditors of the grantee than it can be defeated as against purchasers for value from the grantee. . . . The words in this section, to wit, 'Any other person than . . . , ' etc., embrace, include and comprehend creditors of the grantee just as certainly and plainly as they embrace, include and comprehend purchasers for value from the grantee." There can be no doubt that the language of this section, standing and considered alone, without reference to other sections relating to the same subject, would include creditors within its protection, and, indeed, all persons save those expressly excluded, whether creditors or not. It is, however, a cardinal rule of statutory construction that a statute must be construed in connection with all other statutory provisions relating to the same subject matter: 2 Sutherland on Statutory Construction, 2d ed., sec. 368; *Wishek v. Becker*, 10 N. Dak. 63, 84 N. W. 590. Applying the foregoing rule, it is apparent that creditors are not included. The section in question is part of the recording laws relating to real estate. It declares the effect of a fail-

ure to record a defeasance. Other sections declare the effect of recording and the failure to record conveyances. Section 3597 makes the recording "constructive notice . . . . to all purchasers or encumbrancers subsequent to the recording." Section 3594 declares that every conveyance "is void as against any subsequent purchaser or encumbrancer . . . . in good faith and for a valuable consideration whose conveyance is first duly recorded." Section 4703 provides that a transfer may be shown to be a mortgage "except as against a subsequent purchaser or encumbrancer for value and without notice, though the fact does not appear by the terms of the instrument." And section 4713 declares that "a mortgage is a lien upon the property mortgaged in the hands of everyone claiming under the mortgage, subsequently to its execution, except purchasers and encumbrancers in good faith without notice and for value." It is thus seen that subsequent purchasers and encumbrancers are elsewhere expressly named as the persons to whom notice is imparted by a recorded <sup>586</sup> conveyance, and who are protected by a failure to record, and we have no hesitation in holding that it was the legislative intent in enacting section 4730 to extend protection to the same class of persons—that is, subsequent purchasers or encumbrancers—and that, in declaring that a conveyance should not be defeated or affected "as against any person" other than those expressly excluded, "any person" must be understood as meaning any person entitled to the protection of the recording laws, namely, subsequent purchasers or encumbrancers. This, in substance, was the conclusion reached by the supreme court of South Dakota under the same statutory provisions, and we think the conclusion is sound: *Murphy v. Plankinton Bank*, 13 S. Dak. 501, 83 N. W. 575. Other courts, under statutes substantially the same, have reached a like result: *Columbia Bank v. Jacobs*, 10 Mich. 349, 81 Am. Dec. 792; *Wolf v. Theresa Village M. F. Ins. Co.*, 115 Wis. 402, 91 N. W. 1014. Some courts have held that the creditors are protected against an unrecorded defeasance. Such decisions will be found to rest either upon statutes expressly protecting creditors, or under a settled policy of interpretation which includes creditors: See *Ives v. Stone*, 51 Conn. 446; *Stephens v. Keating* (Tex.), 17 S. W. 37. These decisions have no application in this state, or

under the statutes of this state as they existed when this transaction occurred. Section 4730, *supra*, which is the governing section, and the section preceding it, are the only ones relating to the effect of a failure to record a defeasance, and their provisions, in our opinion, do not conflict with the provisions of any other code chapter or article. Section 81 of the Revised Codes of 1899, which establishes a rule for the adjustment of conflicting provisions, has, therefore, no application.

As to Deschenes, the deed in question was a mortgage, and this is true as to Griffith, his trustee in bankruptcy, who is plaintiff's grantor. Plaintiff had full notice and knowledge of its true character, and is not, therefore, for the reasons above stated, within the protection of section 4730, *supra*. The plaintiff's title was acquired through the quitclaim deed from Savard, which was given after the latter had executed the mortgage to Harris. It follows that the mortgage is a valid lien, and was properly sustained by the trial court.

Judgment affirmed.

All concur.

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*Unrecorded Deeds* are generally valid as against all persons except purchasers and encumbrancers for valuable consideration without notice: *Noyes v. Crawford*, 118 Iowa, 15, 96 Am. St. Rep. 363; *Warnock v. Harlow* (Cal.), 31 Am. St. Rep. 209. It has been held that a deed to one in trust, if left unrecorded, is void as to subsequent creditors of the purchaser without notice who trusted him on the faith of his ownership: *Bates v. Cobb*, 29 S. C. 395, 13 Am. St. Rep. 742.

An *Unrecorded Mortgage*, though good as between the parties, is not valid as against subsequent purchasers and encumbrancers without notice: *Jackson v. McChesney*, 7 Cow. 360, 17 Am. Dec. 521; *Knickerbocker Trust Co. v. Penn Cordage Co.*, 66 N. J. Eq. 305, 105 Am. St. Rep. 640; *Grand Rapids Nat. Bank v. Ford*, 143 Mich. 402, 114 Am. St. Rep. 668.

The Term "*Creditors*" in a Statute Making an *Unrecorded* chattel mortgage void as to creditors, where the mortgagor retains possession of the property, applies only to such creditors as by legal process have fastened a lien or charge upon the property for the satisfaction of their debts: *Folsom v. Peru Plow Co.*, 69 Neb. 316, 111 Am. St. Rep. 537; *Union Nat. Bank v. Oium*, 3 N. Dak. 193, 44 Am. St. Rep. 533. Under the bankrupt act, the trustee in bankruptcy can attack a chattel mortgage for default in filing: *Skilton v. Codington*, 185 N. Y. 80, 113 Am. St. Rep. 885.

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**SCHMIDT v. BEISEKER.**

[14 N. Dak. 587, 105 N. W. 1102.]

**STATUTE OF FRAUDS—Contract of Agency for the Purchase of Lands.**—If one person employs another as his agent to personally appear at a public sale of land, to bid in, purchase it and take title thereto in the name of the principal, but to pay for it with such agent's money, the principal to repay him upon ascertaining the amount paid for the land and to also pay him a fixed compensation for his services, and such agent bids in and takes title to the land in his own name and then refuses to convey to his principal, the contract is one of agency merely, not relating to a sale of, or to an interest in, lands, and is not within the statute of frauds, and the remedy of the principal is an action at law for damages for a breach of the contract. (p. 707.)

Hanchett & Wartner, for the appellant.

Besessen & Berry and Burke & Middaugh, for the respondent.

<sup>588</sup> **MORGAN, C. J.** This is an action for the recovery of damages for the breach of a contract of agency. Plaintiff employed the defendant to appear for him at the United States land office at Devils Lake and purchase for him a fractional tract of land advertised to be there sold to the highest bidder, under a provision of the United States statutes. The complaint alleges that plaintiff and defendant entered into a contract under which defendant was to appear at said office, bid in and purchase the described tract, pay for it with defendant's money, and that plaintiff was to repay defendant for the money paid for the land as soon as he should ascertain the sum that defendant had paid for said land, and plaintiff was also to pay defendant the sum of seventy-five dollars as his compensation <sup>589</sup> for his services at the same time; that defendant appeared at said land office and bid in and purchased said land for himself in his own name, contrary to his instructions and contract; and procured the evidence of the title to said tract to be issued in his own name, and thereafter sold said land to another person, and thereafter refused to convey the said land to the plaintiff upon being requested so to do; that the value of said land is the sum of one thousand dollars, for which sum plaintiff demands judgment, less one hundred



and forty-five dollars, the sum paid by the defendant for said land. The defendant answered by a general denial. After a jury was impaneled to try the case, the defendant objected to the introduction of any evidence under the complaint, for the reason that the same does not state facts sufficient to constitute a cause of action; and for that reason defendant also moved for judgment on the pleadings at that time. The court sustained this objection and the motion, and judgment was entered dismissing the action. The point on which this ruling was based is that the contract set forth in the complaint is one that relates to a conveyance of an interest in real estate, and is therefore invalid under the provisions of the statute of frauds. Other alleged defects are urged against the complaint, to the effect that the contract pleaded is so indefinite that an action for damages cannot be predicated thereon. These alleged defects are not such as to render the cause of action defective in matters of substance. Plaintiff asked to have the complaint amended after the objection to any evidence being admitted was made, and these amendments should have been allowed. In ruling on such objections the complaint will be more liberally construed than when it is attacked by demurrer: *Waldner v. Bowden State Bank*, 13 N. Dak. 604, 102 N. W. 169.

The question which the defendant principally relies on, and devotes nearly the whole of his written argument to, is that the contract was not in writing, and therefore invalid. The gist of the contract relied on and pleaded is that defendant and plaintiff contracted that defendant was personally to appear at the land office or procure another to there appear for him and purchase the land for the plaintiff, and in plaintiff's name to receive the receiver's receipt from the local land office. Defendant agreed to pay the price at which the land was bought from the United States. Plaintiff agreed to repay said purchase price to the defendant immediately, and as soon as he ascertained the amount of the same, and further agreed to pay to the defendant the sum of seventy-five dollars for his compensation. <sup>500</sup> Does this contract relate to a sale of, or to an interest in, real estate, and render the contract invalid as being "an agreement for a sale of real property or of an interest therein," under section 3960 of the Revised Codes of 1899? We conclude that the contract was simply one of agency or employment, and

cannot be construed to mean that it in any way involved a purchase of the real estate or of any interest therein by the defendant. It does not contemplate that in the performance of the contract the defendant was to take title in himself and was thereafter to convey it to the plaintiff. The statute of frauds deals with contracts necessarily affecting the title and conveyance of real estate as between the parties to the contract. This contract is one of agency. Because the agency involved a bidding in of real estate in the name of the principal, it did not become a contract for the sale of real estate as between the plaintiff and defendant. It involved a purchase of the land by the plaintiff through his agent, the defendant, but no sale or conveyance by the agent to the principal was to follow under the contract. The title was not to be in him, and therefore no conveyance by him could have been intended. If the land was to be purchased by the defendant in his own name and then conveyed to the plaintiff, a different question would be presented. The cases cited by the respondent involve contracts that required the agent to convey the real estate to the principal. The distinction between such cases and this one is so obvious that further statement is unnecessary. *Burden v. Sheridan*, 36 Iowa, 124, 14 Am. Rep. 505, is cited as in point, but that case involved a contract requiring the agent to convey to the principal. The following cases hold contracts such as here involved not within the provisions of the statute of frauds: *Watters v. McGuigan*, 72 Wis. 155, 39 N. W. 382; *Carr v. Leavitt*, 54 Mich. 540, 20 N. W. 576; *Wilson v. Morton*, 85 Cal. 598, 24 Pac. 784; *Baker v. Wainwright*, 36 Md. 336, 11 Am. Rep. 495; *Snyder v. Wolford*, 33 Minn. 175, 53 Am. Rep. 22, 22 N. W. 254; *Gardner v. Randell*, 70 Tex. Supp. 781, 7 S. W. 781; *Miller v. Kendig*, 55 Iowa, 174, 7 N. W. 500; *Rose v. Hayden*, 35 Kan. 106, 57 Am. Rep. 145, 10 Pac. 554. These cases are in point as sustaining the proposition that actions for damages may be based on such contracts although made in parol.

Respondent also insists that defendant did not become a trustee of this land for the plaintiff. We do not think that the question is involved. The plaintiff does not seek to follow the land in an <sup>591</sup> equitable action. He brings an action at law for damages. No valid objection is made to the contract set forth, and, under the authorities cited, we

hold it to be a valid and enforceable contract in an action at law by the principal for damages.

The judgment is reversed, and the cause remanded for further proceedings.

All concur.

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*For Authorities upon the question involved in the principal case, see the note to McCoy v. McCoy, 102 Am. St. Rep. 230, on what amounts to a contract for the sale of land within the meaning of the statute of frauds. Parol evidence of trusts in land is the subject of a recent note to Insurance Co. v. Waller, 115 Am. St. Rep. 774.*

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**OHIO.**

**INTERURBAN RAILWAY AND TERMINAL COMPANY  
v. HANCOCK.**

[75 Ohio St. 88, 78 N. E. 964.]

**CARRIERS—Relative Duty of Carrier and Passenger.**—A common carrier is bound to exercise the utmost practicable care and diligence to secure the safety of passengers, but a duty of reasonable care for their own safety rests upon the passengers. (p. 717.)

**CARRIERS—Passenger Projecting Arm from Window.**—It is negligence per se for a passenger on a rapidly moving steam or interurban electric car to unnecessarily and heedlessly project his arm out of the window. (p. 719.)

Frank E. Dinsmore, Charles M. Leslie and Nichols & Nichols, for the plaintiff in error.

Prescott Smith and D. W. Murphy, for the defendant in error.

<sup>89</sup> **SPEAR, J.** Hollis Hancock, defendant in error, brought action in the common pleas of Clermont to recover for an injury received while a passenger on a car of the Interurban Railway and Terminal Company, being operated at the time on a double track railway used in common by that company and by the Cincinnati, Georgetown and Portsmouth Railroad Company, both operating electric cars independently of each other. His amended petition charges that the accident took place June 5, 1903. The car on which he was riding was going east on Eastern avenue, in the city of Cincinnati, and at the same time a car of the other company was going west, and both at the time on a slight curve. Plaintiff took a seat upon the left side of the car and rested his left arm upon a rail at one of the windows, and while thus seated was struck (710).

by a car or some object extended therefrom owned and operated by the Cincinnati, Georgetown and Portsmouth Company. The bar on which plaintiff's arm rested was so located that passengers would naturally rest their arms thereon, and that passengers had been in the habit of so resting their arms, of all of which defendants had knowledge. No notice or warning was given plaintiff. The left arm was fractured below the elbow and a comminuted fracture resulted at the elbow. The negligence charged was that of operating cars too wide for the space between the tracks, and for running past each other at a dangerous and unreasonable rate of speed, and in not providing proper guard screens or other appliances on the cars and not warning passengers of danger.

<sup>90</sup> By its answer the interurban company admitted that plaintiff was a passenger on one of its cars at the time and place alleged, and denied all other allegations. The other defendant denied all the allegations of the petition, and both defendants averred that whatever injury the plaintiff received was caused by his own negligence and want of proper care.

It appeared by the testimony that plaintiff was seated in the last seat in the car, on the left-hand side at an open window. All the windows of the car were open, the window frame dropping down into a box arrangement. The sill was about six inches above the seat. On the outside of the car, and across all the windows, the ends as well as sides, were four iron rods or bars equally distant from each other, the top rod being approximately twelve inches above the window-sill. The plaintiff placed his left arm on the top of and over the rods. He described it by saying: "I was leaning back with my arm resting on the rod of the car, my hand on the inside." The accident occurred at a slight curve in the tracks, and was occasioned by the arm being struck by the west-bound car. "I had my arm," the plaintiff further stated, "resting on one of these rods across the window, and was struck by a Cincinnati, Georgetown and Portsmouth car; I saw the car and the handles on the side. It was an open car."

The tracks were owned by the Cincinnati traction company, and the defendants operated their interurban cars thereon by a traffic arrangement recently entered into. Evidence given as to the distance between the two cars on the inside

tended to show that the space between the closed car and <sup>91</sup> the handles of the open car was from three to four inches, but as the negligence of the defendants seems to be practically conceded, and was assumed by the trial court, it is not necessary to take further space as to this phase of the case. The plaintiff was a stationary engineer, employed at the waterworks in the village of California, and took the car at Cincinnati to go to that place. He had ridden upon the new cars operated by defendants over this part of the road once or twice before, but it does not appear that on either of those occasions he had ridden on the side of the car next the other track.

In the charge to the jury the trial judge, among other things, instructed them that, "If you find from the evidence that the plaintiff, at the time of the alleged accident and injury, was riding in one of the cars of the Interurban Railway and Terminal Company, one of the defendants herein, and you further find that there were four iron bars extending horizontally across the windows of said car, equally distant from each other, the top rod of which was approximately twelve inches from the window-sill, and you find that plaintiff, while seated in this car, permitted or allowed his arm or any part thereof to extend or project out beyond or over said rods, and that said act of plaintiff directly contributed to the accident, then I charge you that the plaintiff was guilty of contributory negligence and cannot recover, and your verdict should be for the defendants." Other parts of the general charge were in consonance with this instruction, and this constituted the law of the case respecting the matter of contributory negligence for the jury's guidance. A verdict for defendants <sup>92</sup> was returned which was followed by judgment thereon. This instruction the circuit court held to be erroneous, and the judgment was by that court, for that reason, reversed. The defendants below bring error.

<sup>101</sup> It is apparent from the testimony of the plaintiff himself that a presumption arises that his arm, or a portion of it, at the time of the <sup>102</sup> accident, extended out beyond the bars, and this presumption is strengthened by the character of the injury and by the absence of any showing that the bars themselves, or any part of them, were struck by the blow by which the arm was broken. The only question being that of contributory negligence on the part of the plaintiff, this state

of facts presented the question, as a matter of law, whether or not it is negligence for a passenger to purposely and unnecessarily extend his arm out of the window beyond the side of the car. This question, as already stated, was adjudged in one way by the common pleas court, and in the contrary way by the circuit court. To determine which of these views is the correct one is the question before this court.

The precise question has not heretofore been presented to this court with respect to passengers upon electric cars, nor do we find many cases bearing close relation to this one in other jurisdictions. There are, however, many decisions involving like accidents upon cars propelled by steam, which have disclosed a diversity of opinion between courts of different states. Speaking in general terms, it may be stated that projecting an arm out of the window of a steam railroad car is held to be negligence per se by courts of last resort in the states of Massachusetts, Pennsylvania, Maryland, Indiana, Virginia, Kentucky, West Virginia and Alabama, and by some text-writers of excellent standing, while the contrary doctrine, i. e., that it is a question to be determined by the facts of each case, and therefore always for the jury, is held in Wisconsin, Louisiana and North Carolina, and by some text-writers of respectable <sup>103</sup> standing. The reasoning in support of the holding of negligence per se is well stated by Thompson, J., in *Pittsburg etc. R. Co. v. McClurg*, 56 Pa. 294, thus: "When a passenger on a railroad purchases his ticket it entitles him to a seat in the cars. In the seat, no part of his body is exposed to obstacles outside of the car. He is secure there, ordinarily, from any contact with them. Where he is thus provided with a seat, safe and secure in the absence of accident to the train, and the carrier has a safe and convenient car, well conducted and skillfully managed, his duty is performed toward the passenger. The duty of the latter on entering arises, namely, that he will conform to all the reasonable rules and regulations of the company for occupying, using and leaving the car; and, after doing so, if injury befall him by the negligence of the carriers, they must answer; if he do not so conform, but is guilty of negligence therein, and is injured, although there may be negligence on part of the carrier, their servants and agents, he cannot recover. . . . A passenger, on entering a railroad car, is to be presumed to know the use of a seat, and the use of a win-

dow; that the former is to sit in, and the latter is to admit light and air. Each has its separate use. The seat he may occupy in any way most comfortable to himself. The window he has a right to enjoy—but not to occupy. Its use is for the benefit of all, not for the comfort alone of him who has by accident got nearest to it. If, therefore, he sit with his elbow in it, he does so without authority; and if he allow it to protrude out, and is injured, is this due care on his part? He was not put there by the carriers, <sup>104</sup> nor invited to go there; nor misled in regard to the fact that it is not a part of his seat, nor that its purposes were not exclusively to admit light and air for the benefit of all. His position is, therefore, without authority. His negligence consists in putting his limbs where they ought not to be, and liable to be broken, without his ability to know whether there is danger or not approaching. In a case, therefore, where the injury stands confessed, or is proved to have resulted from the position voluntarily or thoughtlessly taken, in a window, by contact with outside obstacles or forces, it cannot be otherwise characterized than as negligence, and so to be pronounced by the court. This is undoubtedly the rule in Massachusetts: *Todd v. Old Colony R. R. Co.*, 3 Allen, 18, 80 Am. Dec. 49; and again in 7 Allen, 207, 83 Am. Dec. 679." In *Pittsburg etc. R. R. Co. v. Andrews*, 39 Md. 329, 17 Am. Rep. 568, the holding is: "If a passenger of mature years voluntarily or inattentively projects his elbow or arm out of the window of a railroad car in which he is traveling, and it is injured by coming in contact with a freight-car standing on a siding near the main track of the railroad, he is not entitled to recover damages for such injury from the railroad company. The placing of his arm out of the window is an act of contributory negligence on his part, and the court should so instruct the jury, as matter of law, notwithstanding the company may have been guilty of negligence in permitting the car on the siding to be placed too near the track of the passing train." In *Georgia Pac. Ry. Co. v. Underwood*, 90 Ala. 49, 24 Am. St. Rep. 756, 8 South. 116, it is observed in the opinion by McClellan, J., that: "This question is an open one in Alabama. We are, however, satisfied <sup>105</sup> with the rule as formulated and supported by the great number of adjudged cases, and the texts to which we have referred. The reasons upon which they base the doctrine appear to be eminently sound.



Windows are not provided in cars that passengers may project themselves through or out of them, but for the admission of light and air. They are not intended for occupation, but for use and enjoyment without occupation. No possible necessity of the passenger can be subserved by the protrusion of his person through them. Neither his convenience nor comfort requires that he should do so. It may be, doubtless is, true, that men of ordinary prudence and care habitually lean upon, or rest their arms upon, the sills or windows by which they ride. But this is a very different thing from protrusion beyond the outer edge of the sills, and beyond the surface of the car. We cannot concur in the assumption of the Wisconsin court that prudent men are habitually given to thus projecting themselves from the windows of moving trains. Judge Thompson, who evinces an inclination to agree with that court, fails to indorse this assumption as to the habits of prudent men, which is the keystone to the position announced by it. He says: 'It is perhaps not too strong a statement that no person ever traveled on a railway train without at some time resting his arm on the window-sill at least, if not permitting it to protrude slightly. Conduct which is universal is necessarily that of persons reasonably prudent': Thompson on Carriers of Passengers, p. 258. But the conduct which is assumed by him to be universal is that of resting the arm on the sill, not <sup>106</sup> permitting it to protrude even slightly beyond. The former, prudent men may do; but we cannot conceive that the latter is an act which a man of reasonable care and prudence would ever voluntarily do, much less that it is the habit of such men to so act. The former, under ordinary circumstances, is not negligence. The latter, according to the overwhelming preponderance of authority, based on sound reason, as we conceive, standing by itself, is always negligence per se, which will defeat a recovery for any injury to which it proximately contributed." The holding of the court is that: "It is negligence per se, to be so declared by the court as matter of law, for a passenger on a steam railway to protrude his arm, hand or elbow through the window of the car while in motion, beyond the outer edge of the window, or outer surface of the car; and such negligence on his part, contributing proximately to an injury received by collision with an object passing near by, bars a recovery for damages."

As before stated, the opposite doctrine is maintained in a number of decisions. Probably that contention is not better stated than by Cole, J., in *Spencer v. Milwaukee etc. R. R. Co.* 17 Wis. 487, 84 Am. Dec. 758. We quote: "The party must be entirely free from negligence which contributes to the injury, and it was for the jury to say, under all the circumstances, whether the plaintiff was wanting in care and attention or not. This, it is obvious, must be so, unless the court is authorized in saying, as a matter of law, in every case, that a person who extends his hand or arm in the slightest degree out of the window of a railroad car while the train is in motion is chargeable with <sup>107</sup> negligence, and cannot recover damages if injured while in this position by the carelessness and negligence of the agents and servants of the company. Can the court lay down any such fixed, unbending rule which is applicable to all cases and all circumstances? It appears to us clearly it cannot. And certainly, when we consider the manner in which railroad cars are usually constructed, with the windows so that they can be opened, and arranged at a sufficient height from the seat so that passengers will almost unconsciously place their arms upon the sill for support, there being no bars or slats before the window to prevent their doing so, then to say that if a passenger's arm extends the slightest degree beyond the outside surface, he is wanting in proper care and attention, and that if an injury happens, he cannot recover, because his conduct must have necessarily contributed to the result, appears to us to be laying down a very arbitrary and unreasonable rule of law. It is probably the habit of every person while riding in the cars to rest the arm upon the base of the window. If the window is open, it is liable to extend slightly outside. This, we suppose, is a common habit. There is always more or less space between the outside of the car and any structure erected by the side of the track, and must necessarily be so, to accommodate the motion of the car. Passengers know this, and regulate their conduct accordingly. They do not suppose that the agents and managers of the road suffer obstacles to be so placed as barely to miss the car while passing. And it seems to us almost absurd to hold that, in every case and under all circumstances, if the party injured had his arm <sup>108</sup> the smallest fraction of an inch beyond the outside surface, he was wanting in ordinary care and prudence." Chi-

cago etc. R. R. Co. v. Pondrum, 51 Ill. 333, 2 Am. Rep. 306, is hardly in point, because the rule of comparative negligence, not recognized in Ohio, though then held in Illinois, is applied to the facts. The court seems to have regarded the act of the passenger in permitting his arm to slightly project outside of the window as a negligent act, slight, however, in comparison with the gross negligence of the company in permitting its freight-cars, or other permanent bodies, to stand so near its tracks that passing trains would come within a few inches of such bodies, and for this reason the judgment was allowed to stand.

Other holdings of like import with that of the Wisconsin case are found in the reports of courts of last resort in the states of Louisiana and North Carolina, and some text-writers follow these cases. In this conflict of authority it would be useless to attempt to reconcile the differing decisions. We are, however, of opinion that the weight of judicial expression is with the conclusion of negligence per se where the passenger unnecessarily and heedlessly protrudes his arm beyond the window. And, after much consideration and reflection, we are also of opinion that this conclusion is supported by the sounder reasoning. The quotations hereinbefore given from the Pennsylvania and Alabama cases adequately, and as we think satisfactorily, support the conclusions of those courts. It is not intended to abate or modify the rule that the common carrier is bound to exercise the utmost practicable care and diligence to secure <sup>100</sup> the safety of the passenger, but a duty of reasonable care as well rests upon the passenger himself. He must not heedlessly expose himself to danger, but is as much required to use reasonable care to avoid injury as the carrier is to use the greatest degree of care to protect the passenger. He must not voluntarily expose himself to needless peril. If of ordinary intelligence, the traveler knows the mode in which railroads are constructed, and the rapid rate at which trains move. He knows that on the outside are posts and barriers near to the track, and that where there is a double track, cars operated at a rapid rate are constantly passing in close proximity. With this knowledge on the part of the passenger it must be obvious that the extension of any part of his body on the outside of the car is attended with more or less risk, more or less danger. It may be debatable as to the extent of the danger under differing circumstances,

but it cannot admit of debate that the act is risky and invites danger. It is not a case where it ought to be said that different minds may reach different conclusions, and therefore presents a situation requiring the submission of the question of negligence or no negligence in the abstract to a jury, because such requirement exists only where different reasonable minds may reasonably differ. Nor is the objection met by the proposition that many people thus expose themselves. Many people who travel are all the time taking needless risks, but it does not follow that the taking of such risks is the habit of ordinarily prudent people. Persons are constantly jumping on and off of cars while in motion, and many alight with their faces to the <sup>110</sup> rear of the car. So, too, it is within the observation of all who have watched the management of trains, especially in the neighborhood of railroad yards, that persons ride on the cowcatcher or pilot even on trains running rapidly, and many of our fellow-citizens, usually those in humble station, it is true, ride constantly on the bumpers of freight-cars. But this does not make such acts the conduct of ordinarily prudent persons. That any of these acts have or not contributed to any injury received by the passenger in the given instance admits of debate, and thus makes it proper to submit the question to a jury, but that they are negligent acts in themselves involving more or less risk cannot rationally be disputed. Negligence is said to be such an inadvertent imperfection, by a responsible human agent, in the discharge of duty, as naturally may produce damage, and these acts are negligent acts because it is the duty of every human being to protect himself. Any act, therefore, which subjects the doer of it to unnecessary danger is a breach of that duty, and in the last analysis is negligence. In failing to give proper effect to these considerations, the reasoning of the court in the Wisconsin case, and in the cases which have followed it, appears to us to be at fault; the duty of the passenger possessing intelligence which enables him to foresee and avoid danger, and to exercise ordinary prudence to escape it, seems not to have been given due weight. And even in the Wisconsin case, as appears by the language of the learned judge who delivered the opinion, if there had been bars or slats before the window, the judgment might have been different. So that, <sup>111</sup> should our conclusion on the abstract question of negligence be thought unsound, it is to be noted as of im-

portance that our case is differentiated from the Wisconsin and other like cases in that in the case at bar there were bars across the window at the time of the accident.

Assuming, therefore, that the rule respecting the conduct of a passenger on a steam-car is to forbid his extending his arm out of the car window without himself assuming the risk of injury, should a different rule be applied to a passenger on an interurban electric car? We are of opinion that there should not be. As such cars are now operated throughout the country they run at a rapid rate. Their construction ordinarily, if not necessarily, involves the maintenance near the tracks of poles and barriers of various kinds. Cars running in opposite directions, as well on switches as where there is a double track, are often necessarily run near together. There is, perhaps, more necessity for locating tracks near together inside of municipalities than in the open country, and upon narrow streets it often happens that the company is required to lay the rails at less distance apart than they would prefer to place them, because of crowded conditions and the requirements of the municipal authorities. To say that, as a rule of law, a passenger on such car may be heedlessly negligent, exposing his person to needless danger, and visit the consequences on the interurban company upon showing negligence on its part, appears to us to be without reason. Nor is it supported by authority. On the contrary, the generally recognized rule is that the passenger cannot cast upon the carrier responsibility <sup>112</sup> for an event which, except for his own contributing negligence, would not have happened, and the law, as always held in this state, does not undertake, when both parties have been negligent, to measure the degree of the negligence of each. And we are of opinion that no substantial reason exists why these same rules of care and of responsibility in the particulars stated imposed upon the passenger in the steam-car ought not to be held to apply to the same passenger in an electric interurban car. We find but few reported cases arising from accidents of this character occurring on street-cars. The case nearest in point to which attention has been called is that of People's Pass. Ry. Co. v. Lauderbach, 4 Penne, 406. The injury occurred by the plaintiff's arm being struck by a street-car passing the car on which the plaintiff was riding, the claim of the company being that his arm protruded out of the car window. It was held that "where a traveler puts his elbow or an arm out of a car

window voluntarily, without any qualifying circumstances impelling him to it, it must be regarded as negligence in se; and where this is the state of the evidence, it is the duty of the court to declare the act negligence in law."

It was sought to support the plaintiff's case below by proof that many other people extended their arms out. Probably so. But we are unable to see how this sort of testimony ought to determine the question of ordinary care. Probably an equal number did not so extend their arms. If this kind of testimony may be resorted to, where would the inquiry end? And would the dispute be determined by showing on which side there was a majority?

<sup>113</sup> Recurring again to the evidence, it appears that there were four rods or bars across the windows of the car, including the one in question, and that the highest rod was a foot above the window-sill. It was upon the top rod or bar that plaintiff rested his arm. The purpose of these rods is in dispute. It would seem that, whatever other purpose they might subserve, if any, they were calculated to warn the passenger to keep his person inside the car. It is urged that they were placed there to keep packages and children from falling out. They might serve, in a measure, to further these objects; but passengers' arms are of more consequence than packages, and a warning to children might with equal propriety be heeded by adults. Again it is urged that they were placed outside the window to protect it. If that were the object the wonder is that they were not continued higher up. Again it is insisted that they constituted an invitation to the passenger to rest his arm upon the upper one. As well might it be urged that the bar or strap found on summer cars, extending on one side from one end to the other, and whose manifest object has been always supposed to be to keep passengers from alighting on that side, and others from entering, is, after all, not for those purposes but for the purpose of affording the passenger a convenient resting place for his arm. The proposition surely lacks reason.

Coming now to the charge, it is to be noted that the court left to the jury the matter of the location of the bars, the question of whether or not the plaintiff permitted his arm or any part of it to extend out beyond or over the bars, and <sup>114</sup> whether or not that act contributed to the accident, holding that if all those propositions were found affirmatively then

and in such case there could be no recovery. If we are correct in the deductions hereinbefore made respecting the duty of the passenger, then this charge properly stated the rule of law, and the giving of it to the jury was not error. We think the charge was correct, and that in reversing the judgment of the common pleas because of this instruction the learned circuit court erred. The judgment of that court will be reversed, and that of the common pleas affirmed.

Shauck, C. J., Price, Crew, Summers and Davis, JJ., concur.

**NEGLIGENCE OF A PASSENGER IN PROJECTING A MEMBER OF HIS BODY OUT OF THE CAR WINDOW.**

- I. While Traveling on a Steam Railroad, 721.
- II. While Traveling on a Street Railway, 723.
- III. When Caused by a Jolt of the Car, 723.

**I. While Traveling on a Steam Railroad.**

Many authorities declare that for a passenger on a steam railroad to project his arm, or any other member of his body, through the window and beyond the outer line of the car, is negligence per se, which precludes a recovery for injuries sustained by the exposed member coming in contact with some external object: Indianapolis etc. R. R. Co. v. Rutherford, 29 Ind. 82, 92 Am. Dec. 336; Louisville etc. R. R. Co. v. Sickings, 5 Bush, 1, 96 Am. Dec. 320; Favre v. Louisville etc. R. R. Co., 91 Ky. 541, 16 S. W. 370; Todd v. Old Colony etc. R. R. Co., 3 Allen, 18, 80 Am. Dec. 49; Todd v. Old Colony R. R. Co., 7 Allen, 207, 83 Am. Dec. 679; Pittsburg etc. R. R. Co. v. McClurg, 56 Pa. 294; Carrico v. West Virginia etc. Ry. Co., 35 W. Va. 389, 14 S. E. 12. "According to these decisions," it is said, "the protrusion of the limbs of the passengers, even to the minutest distance out of the windows of the car, will be regarded as necessarily and under all circumstances such contributory negligence on the part of the passenger as will deprive him of all right to claim compensation from the carrier for injuries which may be occasioned thereby, however incautious the latter may have been in guarding against such accidents": Dun v. Seaboard etc. R. R. Co., 78 Va. 645, 49 Am. Rep. 388; Richmond etc. R. R. Co. v. Scott, 88 Va. 958, 14 S. E. 763, 16 L. B. A. 91.

"The reasons upon which they base the doctrine," to quote from the supreme court of Alabama, "appears to be eminently sound. Windows are not provided in cars that passengers may project themselves through or out of them, but for the admission of light and air. They are not intended for occupation. No possible necessity of the passenger can be subserved by the protrusion of his person through them. Neither his convenience nor comfort requires that he

should do so. It may be, doubtless is, true that men of ordinary prudence and care habitually lean upon or rest their arms upon the sills of windows by which they ride. But this is a very different thing from protrusion beyond the outer edge of the sills and beyond the surface of the car": *Georgia Pac. Ry. Co. v. Underwood*, 90 Ala. 49, 24 Am. St. Rep. 756, 8 South. 116, approved in *Union Pac. R. R. Co. v. Roeser*, 69 Neb. 62, 95 N. W. 68, and in the principal case, ante, p. 710.

The foregoing doctrine has been applied where a passenger on a train extended his arm, hand or elbow through the car window, when it came in contact with another car standing on a sidetrack (*Pittsburg etc. R. R. Co. v. Andrews*, 39 Md. 329, 17 Am. Rep. 568), or with a post in a tunnel through which the train was passing: *Clark v. Louisville etc. R. R. Co.*, 101 Ky. 34, 39 S. W. 840. It has also been applied where a boy only ten years old thrust his head out of the window, when it struck a car standing on a sidetrack: *Knauss v. Lake Erie etc. R. R. Co.*, 29 Ind. App. 216, 64 N. E. 95. In the principal case, the Ohio court applies it to a passenger on a rapidly moving interurban electric train who projected his arm out of the window.

Many authorities, on the other hand, maintain that it is not negligence, as a matter of law, for a passenger on a railroad train to project his arm or elbow out of the car window; and that, if he does so, his conduct does not necessarily preclude him from recovering damages for injuries suffered by the limb coming in contact with some external object. The question of the passenger's negligence, in such a case, is a question of fact, to be determined from the surrounding facts and circumstances: *Kird v. New Orleans etc. R. R. Co.*, 105 La. 226, 29 South. 729; *Clerc v. Morgan's Louisiana etc. Steamship Co.*, 107 La. 370, 90 Am. St. Rep. 319, 31 South. 586; *Barton v. St. Louis etc. R. R. Co.*, 52 Mo. 253, 14 Am. Rep. 418; *Quinn v. South Carolina Ry. Co.*, 29 S. C. 381, 7 S. E. 614, 1 L. R. A. 682; *Gulf etc. Ry. Co. v. Daushank*, 6 Tex. Civ. App. 385, 25 S. W. 295; *Gulf etc. Ry. Co. v. Phillips*, 32 Tex. Civ. App. 238, 74 S. W. 793. This, it would seem, is the sounder doctrine. It appears unreasonable to affirm that, in every case, and under all circumstances, a passenger is so wanting in care and prudence, when he allows any portion of his person to extend beyond the outer surface of the car, that he has no redress if struck by another car left standing close to his train, or by a structure erected by the railroad company so near to its main track that passing cars run within a few inches of it: *Kird v. New Orleans etc. Ry. Co.*, 109 La. 525, 94 La. St. Rep. 452, 33 South. 587, 60 L. R. A. 727; *Francis v. New York Steam Co.*, 114 N. Y. 380, 21 N. E. 988; *McCord v. Air Line etc. R. R. Co.*, 134 N. C. 53, 45 S. E. 1031; *Moaker v. Willamette Val. Ry. Co.*, 18 Or. 189, 17 Am. St. Rep. 717, 22 Pac. 948, 6 L. R. A. 656; *Spencer v. Milwaukee etc. R. R. Co.*, 17 Wis. 487, 84 Am. Dec. 758. The



last case is a leading authority on this question, and has recently been cited by the supreme court of Georgia in holding that a passenger on a street railway is not negligent, as a matter of law, while riding on the back platform of a car smoking, to project his head a few inches beyond the side line of the car to expectorate: *Salmon v. City Electric Ry. Co.*, 124 Ga. 1056, 53 S. E. 575.

## II. While Traveling on a Street Railway.

The decisions are practically unanimous in holding that for a passenger on a street-car to project his arm or elbow slightly out of the window is not negligence per se, precluding him in all cases from any right to a recovery from injuries sustained by his arm coming in contact with extraneous objects. Whether or not his conduct amounts to negligence and bars a recovery is a question of fact. The courts seem disposed to adopt a less stringent rule in dealing with passengers on street railways than with passengers on steam railroads: *Chicago City Ry. Co. v. Rood*, 62 Ill. App. 550; *South Covington etc. Ry. Co. v. McCleave*, 18 Ky. Law Rep. 1036, 38 S. W. 1055; *Summers v. Crescent City*, 34 La. Ann. 139, 44 Am. Rep. 419; *North Baltimore Pass. Ry. Co. v. Kaskell*, 78 Md. 517, 28 Atl. 410; *Dahlberg v. Minneapolis St. Ry. Co.*, 32 Minn. 404, 50 Am. Rep. 585, 21 N. W. 545; *Miller v. St. Louis R. R. Co.*, 5 Mo. App. 471; *Smith v. St. Louis Transit Co.*, 120 Mo. App. 328, 97 S. W. 218; *Francis v. New York Steam Co.*, 114 N. Y. 380, 21 N. E. 988; *Tucker v. Buffalo Ry. Co.*, 65 N. Y. Supp. 989, 53 App. Div. 571, 169 N. Y. 589, 62 N. E. 1101; *Georgetown etc. Ry. Co. v. Smith*, 25 App. D. C. 259.

It has been decided, however, that a street-car passenger who, on account of sudden illness, stands or kneels upon the seat, and puts her head out of the window, above a screen covering the lower half of the window, and is struck by a trolley pole beside the track, is chargeable with negligence per se which precludes a recovery for her injuries: *Christensen v. Metropolitan St. Ry. Co.*, 137 Fed. 708, 70 C. C. A. 657. It has also been held that a passenger on a street-car who, in the night-time, puts his head out of a window to ascertain the color of the car and identify it, cannot recover from the railway company for injuries sustained by his head striking some external object: *Moore v. Edison Elec. etc. Co.*, 43 La. Ann. 792, 9 South. 433.

## III. When Caused by a Jolt of the Car.

The authorities are agreed upon the proposition that it is not negligence per se for a passenger, whether on a steam railroad or a street railway, to rest his arm on the sill of an open window, wholly within the car, in case it is injured in that position, or is jarred through the window by a jolt of the car, and injured outside the car: *Winters v. Hannibal etc. R. R. Co.*, 39 Mo. 468; *Moaker v.*

Willamette Val. Ry. Co., 18 Or. 189, 17 Am. St. Rep. 717, 22 Pac. 948, 6 L. R. A. 656; Germantown Passenger R. R. Co. v. Brophy, 105 Pa. 38; People's Passenger Ry. Co. v. Lauderbach (Pa.), 3 Atl. 672; Gulf etc. Ry. Co. v. Killebrew (Tex.), 20 S. W. 182; Carries v. West Virginia etc. Ry. Co., 35 W. Va. 389, 14 S. E. 12; Farlow v. Kelly, 108 U. S. 288, 2 Sup. Ct. Rep. 555, 27 L. ed. 726; Schneider v. New Orleans etc. R. R., 54 Fed. 466.

### STATE v. ZURHORST.

[75 Ohio St. 323, 79 N. E. 238.]

**INDICTMENT for Publishing Obscene Literature.**—An indictment charging that the accused, at a certain time and place, "unlawfully did have in his possession two hundred and twenty-one copies of a certain article of an indecent and immoral nature, to wit, a certain printed pamphlet of an indecent and immoral nature, entitled 'Circular Number One—A Biographical Sketch of a Few Short Skate Politicians,' for the purpose of giving away, exhibiting and publishing the said pamphlet, which said pamphlet is so indecent and immoral in its nature that the same would be offensive to the court and improper to be placed upon the records thereof," is sufficient, without setting forth a copy of the pamphlet. (pp. 728, 729.)

Roy H. Williams, prosecuting attorney, for the state.

H. C. De Rau, for the defendant.

**233 PRICE, J.** The grand jury of Erie county, at the April term of the court of common pleas held in 1905, returned an indictment against Ed. H. Zurhorst for a violation of section 7027 of the Revised Statutes, the first count of which charges: "That Ed. H. Zurhorst, late of said county, on the 16th day of March, in the year of our Lord one thousand nine hundred and five, at the county of Erie aforesaid, unlawfully did have in his possession two hundred and twenty-one copies of a certain article of an indecent and immoral nature, to wit, a certain printed pamphlet of an indecent and immoral nature, entitled 'Circular Number One—A Biographical Sketch of a Few Short Skate Politicians,' for the purpose of giving away, exhibiting and publishing the said pamphlet, which said pamphlet is so indecent and immoral in its nature that the same would be offensive to the court and improper to be placed upon the records thereof, wherefore the jurors aforesaid do not set forth the same in the indictment." The

other counts charge a violation of the same section of the statute, but in different forms, neither of which contains a copy of the alleged libelous pamphlet.

The accused filed a motion to quash the indictment on the following grounds: 1. The said indictment does not contain a copy of the alleged libelous article, and no excuse or sufficient reason is assigned for omitting the same; 2. The said indictment is not properly indorsed; 3. Other defects in the form of the indictment <sup>234</sup> and in the manner in which the said offense is charged, apparent upon the face of the record.

The court sustained the motion and quashed the indictment. The prosecuting attorney in behalf of the state excepted, and prepared a bill of exceptions, which was duly allowed and signed by the court of common pleas by whom the decision was rendered, and the same is, by leave taken, filed in this court for its decision on the points involved.

<sup>235</sup> It is our opinion that the court of common pleas erred in sustaining the motion to quash the indictment, and some reasons will be given in support of that opinion.

Nothing is now claimed for the second ground of the motion, and the same is abandoned.

The accused is not charged with libel as defined in section 6828 of the Revised Statutes, which is a crime against the person, but he is charged with violating section 7027 of the Revised Statutes, which is part of chapter 9, entitled, "Offenses against chastity and morality." The part of the section here pertinent reads: "Every person who, within the state of Ohio, sells, or lends, or gives away, or in any manner exhibits, or offers to sell, or to lend, or to give away, or in any manner to exhibit, or otherwise publishes or offers to publish in any manner, or has in his possession for any such purpose, any obscene, lewd or lascivious book, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, drawing or other representation, figure or image, or of paper or other material or any cast, instrument or other article of an indecent or immoral nature, or . . . shall, on conviction, be imprisoned," etc.

<sup>239</sup> While the title is not controlling in the construction of a statute, it sometimes throws light on the legislative purpose, and we find that the original section upon which the several subsequent amendments have been based, and the several amendments themselves, bear titles similar to that head-

ing the present statute, to wit: "Penalty for disposing of, exhibiting, advertising, manufacturing, etc., obscene literature, drugs intended for criminal purposes, etc.": See 91 Ohio Laws, 330. It is sought by this enactment to protect the public from the baneful effects and influence of obscene, lewd and lascivious books, pamphlets and other written or printed matter. These publications are made criminal in the same section which prohibits the advertisement of drugs, etc., intended for criminal purposes, and the entire section aims to prevent the contamination of our youth and the demoralization of the public mind. It forbids one to have in his possession such poisonous literature, advertisements, etc., for the purpose of selling, lending or giving away the same. It is well enough, and it is good practice, that an indictment under this statute should with reasonable certainty apprise the accused of what he is called upon to meet—such degree of certainty as will afford him protection in the exercise of his legal rights in making a defense, and also to furnish a record of conviction or acquittal, that could be interposed if indicted the second time for the same offense. But we doubt whether the strict rules of pleading at common law in cases of criminal libel should be enforced in a prosecution under this statute. As to some of the different offenses defined therein, the application of such rules might <sup>240</sup> defeat the purpose of the legislature, or otherwise render it impracticable.

However this may be (and we do not decide it), if we look to this indictment, it is seen that all reasonable rules have been complied with, unless nothing short of an exact copy of the scurrilous pamphlet must be set out therein. The defendant is charged with having "in his possession two hundred and twenty-one copies of a certain article of an indecent and immoral nature, to wit, a certain printed pamphlet of an indecent and immoral nature, entitled: 'Circular Number One—A Biographical Sketch of a Few Short Skate Politicians,' for the purpose of giving away, exhibiting and publishing the said pamphlet, which said pamphlet is so indecent and immoral in its nature that the same would be offensive to the court and improper to be placed upon the records thereof, wherefore the jurors aforesaid do not set forth the same in the indictment." The accused, according to the indictment, was in possession not only of one copy of the pamphlet, which might be by accident or inadvertence, but was in possession

of over two hundred, and that, too, for the purpose of selling, giving away, exhibiting, etc. The title is bold, and it announces that it is only circular No. 1, indicating that other numbers will follow. It is alleged that the pamphlet—not a part of it—is so indecent and immoral in its nature, that the same would be offensive to the court and improper to be placed on the records. If such allegation is true, we know that a copy of the offensive contents in the indictment would find a permanent place on the records of the court, a mode of publication greatly <sup>241</sup> to be desired by the disseminators of such scandalous literature.

It was said by Parker, C. J., in *Commonwealth v. Holmes*, 17 Mass. 336: "It can never be required that an obscene book and picture should be displayed upon the records of the court, which must be done if the description in these counts is insufficient. This would be to require that the public itself should give permanency and notoriety to indecency in order to punish it." The indictment in that case charged the accused with publishing a lewd and obscene print contained in a certain book entitled: "Memoirs of a Woman of Pleasure." The indictment did not contain a copy of the alleged indecent and lewd matter, but alleged that the same would be offensive to the court and improper to appear upon the records of the same. It would seem that that allegation has been literally followed in the present indictment. The above case was cited with approval in *Commonwealth v. Tarbox*, 1 Cush. 66. The court there states the general rule in that state to be that "in indictments for offenses of this description (printing and publishing obscene matter), it is not always necessary that the contents of the publication should be inserted; but whenever it is necessary to do so, or whenever the indictment undertakes to state the contents, whether necessary or not, the same rule prevails as in the case of a libel; that is to say, the alleged obscene publication must be set out in the very words of which it is composed, and the indictment must undertake or profess to do so by the use of appropriate language. The excepted cases occur whenever a publication of this character is so obscene as <sup>242</sup> to render it improper that it should appear on record, and then the statement of the contents may be omitted altogether, and a description thereof substituted; but in this case, a reason for the omission must appear in the indictment." The doctrine of those cases is approved in *People v. Girardin*, 1 Mich. 90,

and by many text-writers: See 1 Bishop's New Criminal Procedure, secs. 496, 497.

The same author, in section 790, volume 2, says that "it is the doctrine of the American courts that a libel too obscene to appear with decency on the record may be described in a more general way, and then an averment of the too great obscenity of its words will be accepted instead of their tenor." In Criminal Law and Procedure by Hughes, section 2182, it is said: "It is necessary to set out the obscene publication in the indictment, unless it is in the hands of the defendant or out of the power of the prosecution, or the matter is too gross and obscene to be spread on the records of the court, either of which facts, if existing, should be averred in the indictment."

To the same effect is section 1064 of McLain on Criminal Law. See, also, Price v. United States, 165 U. S. 311, 17 Sup. Ct. Rep. 366, 41 L. ed. 727, where the same questions are discussed and decided.

While the English courts generally have held to a more stringent rule of criminal pleading in such cases, we think the American courts maintain the better and more reasonable practice.

The indictment before us complies with all the requirements of the foregoing and many other authorities. The accused is charged with being <sup>243</sup> in possession of the obscene pamphlets for the purpose of selling and giving away, in order that their contents might be sown upon the public. He had given the document what he regarded as a distinct and appropriate title, and he is supposed to know the contents of what he had in his possession. The indictment says the pamphlet is so obscene and immoral in its nature that to copy it in the indictment would be offensive to the court and improper to appear on the records of the same. Surely, the state alleged enough to apprise him of what he had to meet at the trial, even if we apply the common-law rules of pleading in criminal libel. To gratify his claim against this indictment would aid him in disseminating the evil contents of his own work. But courts will never allow their records to be polluted by obscene and indecent matter. To do this would be to require a court of justice to perpetuate and give notoriety to an indecent publication.

But it is said that, without a copy of the objectionable matter in the indictment, the defendant might, on a second indict-

ment for the same offense, be embarrassed or defeated in his plea of former conviction or acquittal. We see no ground for such fearful anticipation. According to the indictment, the accused has prepared certain earmarks of his pamphlet. It has a certain name and number. The title is somewhat spectacular, and if there is any shortcoming in those, on pleading to a second indictment for the same offense, if such an event should unfortunately ever occur, he can give proper parol evidence to support the identity of the charge. See *Bainbridge v. State*, 30 Ohio St. 264, where it is held: "On plea of <sup>244</sup> former conviction or acquittal, the defendant must prove the identity of the two offenses. He may show this by parol evidence." That entire case supports our proposition.

We are unanimous in sustaining the exceptions.

Shauck, C. J., Crew, Summers, Spear and Davis, JJ., concur.

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*The Principal Case* is supported by *State v. Smith*, 17 R. I. 371, 22 Atl. 282; *State v. Brown*, 27 Vt. 619; *People v. Hallenbeck*, 2 Abb. N. C. 66; *Commonwealth v. Holmes*, 17 Mass. 336; *Commonwealth v. Tarbox*, 55 Mass. (1 Cush.) 66; *McNair v. People*, 80 Ill. 441; *People v. Girardin*, 1 Mich. 90. For other authorities bearing upon this question, see *Reyes v. State*, 34 Fla. 181, 15 South. 875; *Abendroth v. State*, 34 Tex. Cr. Rep. 225, 30 S. W. 787. Under a statute declaring it a felony for one to engage in editing, publishing or disseminating a paper mainly devoted to the publication of scandals and immoral conduct, an indictment charging that on a certain day the defendant engaged in disseminating and selling a certain newspaper, naming it, and alleging that it was devoted mainly to the publications of scandals, assignments and immoral conduct, is sufficient without setting up the contents of the paper, its date, to whom sold, and like details: *State v. Van Wye*, 136 Mo. 227, 58 Am. St. Rep. 627. See, too, *State v. McKee*, 73 Conn. 18, 84 Am. St. Rep. 124.

## PENNSYLVANIA COMPANY v. SHEARER.

[75 Ohio St. 249, 79 N. E. 431.]

**CARRIERS—Contract Limiting Time for Presentation of Claims.**—An agreement between a carrier and a shipper that the shipper must present a verified claim for any loss or damage within a specified time, else the carrier will not be liable therefor, is valid if the time limited is, under the circumstances of the case, a reasonable one. (p. 733.)

Carey & Mullins and C. C. Bow, for the plaintiff in error.

W. O. Wertz, for the defendant in error.

<sup>249</sup> DAVIS, J. This action was commenced by the defendant in error in the court of common pleas of Stark county to recover damages alleged to have been sustained by a shipment of cattle from Robertsville, Stark county, Ohio, to East Liberty, Pennsylvania. The shipment originated on the Wheeling and Lake Erie Railroad, and was delivered to <sup>250</sup> the Pennsylvania Company's lines at Canton, Ohio, and carried by it to Allegheny, Pennsylvania. The damages claimed are alleged to have been the result of delay between these points, causing loss of weight, etc. No other claim is made. The cattle were shipped under a special contract, which was signed by the initial company, the owner, and also the man placed in charge and who accompanied them. The contract contained this clause: "That no claim for damages which may accrue to the shipper under this contract shall be allowed or paid by said carrier, or sued for in any court by said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the W. & L. E. R. R. Co. agent of said carrier at his office in Robertsville within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs." A verdict was rendered in favor of the plaintiff below in the court of common pleas, and judgment was entered thereon, which judgment was affirmed by the circuit court.



The court of common pleas was requested to instruct the jury that if they should find that the requirement in the shipping contract <sup>251</sup> to the effect that the shipper should, within five days from the unloading of the stock, give to the carrier written notice, verified by affidavit, of any loss or damage claimed to have been sustained, is under the circumstances of the case a reasonable requirement, then that the plaintiff could not recover in this action; because it is admitted that no such notice was given. This instruction the court refused to give to the jury; but did instruct as follows: "If the damages occasioned by delay, if you find the plaintiff was damaged by delay, was occasioned by the fault or negligence of the defendant, then notwithstanding the contract, the plaintiff would not be required to make a verified claim for damages within five days to enable him to maintain this suit." The action of the court in thus refusing to charge the jury as requested and in thus charging the jury was, as we think it very clearly appears, a prejudicial error.

It has long been settled law in this state that a common carrier may, by special contract, limit his common-law liability; but that for reasons of public policy a carrier cannot by contract exempt himself from liability for damages resulting from his own negligence. This statement of the law is not disputed in this case; for the question now before us is not whether a carrier may by contract relieve himself, in whole or in part, of a liability resulting from his want of due care, but rather whether a carrier may stipulate for a compliance with a reasonable condition relating to his common-law liability. The foundation of the rule that the carrier may not contract for exemption from liability for negligence is, that a contract for immunity from a liability which results from the <sup>252</sup> carrier's neglect to perform a legal duty would tend to encourage and protect negligence, to the great detriment of commerce and the public interests: *Davidson v. Graham*, 2 Ohio St. 131. If, therefore, the carrier and the shipper, without fraud, imposition or deception, enter into an agreement which does not come within the reason of the rule against exemption from liability for damage resulting from negligence, and is fair and reasonable in itself, it should be enforced as the parties have made it.

It was upon this distinction that this court recently held that in consideration of a reduced rate of carriage a carrier

might lawfully contract to be responsible for no more than the valuation agreed upon at the time of shipment: *Baltimore etc. R. R. Co. v. Hubbard*, 72 Ohio St. 302, 74 N. E. 214. In such a case the stipulation is not a stipulation for exemption as to the whole or any part of the damage which might occur; but is a liquidation of the damages by the parties, in consideration of the carriage at the reduced freight rate. The shipper has the option to pay the higher price of carriage and recover, in case of loss, the real value of the property carried. He chooses to pay the lower rate and accept the lower valuation. There is nothing unreasonable or contrary to public policy in such a special agreement.

This case calls for the application of the same principle. The contract provides that no claim for loss or damages shall be allowed or sued for, unless the claim shall be made in writing, verified by the affidavit of the shipper or his agent, and delivered to the agent of the carrier at the shipping point within five days from the time the stock <sup>253</sup> should be removed from the car or cars. Whether such an agreement is a reasonable one or not must depend on the circumstances of each case. In *Baltimore & O. R. R. Co. v. Hubbard*, 72 Ohio St. 302, 74 N. E. 214, it was held that it was not proper to charge the jury, under the facts of that case, to the effect that a failure to file a claim within five days from the time the stock was removed from the car in which it was shipped would defeat a recovery, because in that case the extent of the damage could not be known until the fifth day; but the court was not then called upon to decide whether such a stipulation in the contract was binding or not, nor whether a recovery could be had if a verified claim were made within five days after the extent of damage was ascertained.

The question, then, is still an open one, unless we are concluded by what was said in *Pittsburgh etc. Ry. Co. v. Sheppard*, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61. In the report of that case it is declared that a common carrier cannot, by special agreement, relieve himself from responsibility for his own negligence, nor limit his liability for losses resulting therefrom. The questions raised in this case and in *Baltimore & O. R. R. Co. v. Hubbard*, 72 Ohio St. 302, 74 N. E. 214, do not appear in *Pittsburgh Ry. Co. v. Sheppard*, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61. and we are not disposed to extend the latter case beyond the

facts stated. However, it must be apparent that what is said as to the right of a carrier to "limit" his liability must be interpreted by the facts in the case; and the only limitation of liability claimed in that case, or the reported cases preceding it, was as to the amount; that is, the right to contract for exemption from liability as to part of the loss or damage.

<sup>254</sup> Here the controversy is not as to the amount; but wholly in regard to notice of the claim. If the shipper should comply with his agreement in that regard, nothing short of the statute of limitations could bar his recovery to the full amount of his loss or damage if he has a good cause of action. The five-day clause is, therefore, not an exemption from liability to any extent, but is merely in the nature of a condition precedent, which, if the shipper performs, his right of recovery remains unimpaired, and if he fails to perform, he incurs the penalty of losing his right to sue. Ordinarily, it would all lie within the realm of his own volition. It is not, therefore, the contract of the carrier which exempts or limits the liability, but the act of the shipper himself. As it was said by the supreme court of the United States, in *Southern Exp. Co. v. Caldwell*, 21 Wall. 264, 22 L. ed. 556, such an agreement contravenes no rule of public policy, it is consistent with holding the carrier to the fullest measure of good faith and diligence which the strictest rules of the common law ever required, and it is intrinsically just and reasonable. It only gives to the carrier an opportunity to ascertain the actual facts, or to trace and recover lost property, before it has become impossible to do so by lapse of time.

The judgments of the circuit court and the court of common pleas are reversed.

Shauck, C. J., Price, Crew and Summers, JJ., concur.

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*For Authorities* upon the question decided in the principal case, see the note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 117. As to the validity of stipulations in contracts to send telegrams that the company shall not be liable for damages in case a claim therefor is not presented in writing within sixty days, see *Davis v. Western Union Tel. Co.*, 107 Ky. 527, 92 Am. St. Rep. 371; *Hartzog v. Western Union Tel. Co.*, 84 Miss. 448, 105 Am. St. Rep. 459; *Arkansas etc. Ry. Co. v. Stroude*, 77 Ark. 109, 113 Am. St. Rep. 130.

## STATE v. HENSLEY.

[75 Ohio St. 255, 79 N. E. 462.]

**PUBLIC TRIAL**—What Amounts to Denial of Right to.—An order of the court in the course of a felony trial that, in view of the immoral or obscene testimony likely to be given by the witnesses next to be called, the court will continue the trial, during their examination, in a small courtroom in which the sheriff shall admit no one except the jury, defendant's counsel, members of the bar, newspaper men, and one other person, a witness for the defendant, exceeds the power of the court, and its enforcement denies the accused his constitutional right to a public trial. (pp. 738, 739.)

**PUBLIC TRIAL**—Waiver of Right to.—The constitutional right of a person charged with a felony to a public trial cannot be waived by silence any more than can his right to a jury trial. (p. 739.)

**INDICTMENT FOR RAPE**—Election Between Counts.—If, upon the trial of a person over eighteen years of age for rape upon a female under sixteen, the indictment, in the first count, charges the offense to have been committed with her consent, and, in the second count, forcibly and against her will, it is not error for the court to overrule a motion by the defendant at the conclusion of the state's evidence in chief to require the state to elect upon which count it will rely. But it is error to charge that the jury may find a general verdict of guilty upon both counts, if they find the evidence of such character as to warrant a conviction upon either count. (p. 740.)

Defendant in error Hensley was convicted of having intercourse with a female under the age of sixteen years, and sentenced to the penitentiary. The district court set aside the verdict and judgment, and remanded the cause for a new trial. The state brings error.

William H. Sheldon, prosecuting attorney, and Charles R. Richardson, for the plaintiff in error.

W. E. Sykes, for the defendant in error.

<sup>255</sup> **SPEAR, J.** At the April term, 1905, of the court of common pleas of Washington county, the defendant in error. Elisha Hensley, was tried and convicted <sup>256</sup> of the crime of unlawfully having intercourse with one L. H., a female person under the age of sixteen years, and was sentenced to the Ohio penitentiary for a term of two and one-half years. At the October term, 1905, of the circuit court of that county, the verdict, sentence and judgment were set aside and the cause remanded to the common pleas for a new trial. The state brings error.

<sup>260</sup> The indictment contained two counts. The first charged that on the eleventh day of March, 1905, the defendant, a male person of the age of eighteen years and upward, did unlawfully and knowingly, carnally know and abuse one L. H., with her consent, she, the said L. H., then and there being a female person under the age of sixteen years, to wit, of the age of fourteen years. And by the second count it was charged that on the same date the defendant in and upon one L. H. unlawfully and violently did make an assault, and her, the said L. H., then and there, did unlawfully, <sup>261</sup> forcibly, and against her will, unlawfully ravish and carnally know, she, the said L. H., then and there being a female person, other than the daughter or sister of the defendant, and being a female person under the age of sixteen years, to wit, of the age of fourteen years.

Three assignments of error are found by the circuit court as ground for the judgment of reversal, viz.: 1. The trial court did not grant defendant a public trial as guaranteed by the constitution; 2. The trial court erred in overruling the motion of defendant to compel the state to elect upon which count in the indictment it would base its claim for a conviction; 3. The court erred in charging the jury that they might find a general verdict of guilty upon both counts if they should find the evidence to warrant a conviction upon either count.

1. Facts bearing upon the first point are: The trial was entered upon in the large general courtroom in the courthouse. At the instance of counsel for defendant the witnesses for the state were ordered excluded from the room until called, and on like motion by the state all witnesses for defendant were also similarly excluded except one Grimes, a witness for defendant, whose presence was desired by defendant's counsel. After the examination of the first witness, on the re-assembling of court after the noon adjournment, the first day of the trial, the court announced that in view of the testimony expected to be given by the next witness he would continue the trial during the taking of the testimony of witnesses likely to give immoral or obscene testimony in the small courtroom, the probate courtroom, and directed the <sup>262</sup> sheriff to admit no one to said room except the jury, defendant's counsel, members of the bar, newspaper men, and Grimes, defendant's witness. The order was made in open court in the

presence and hearing of defendant and his counsel. No objection was made other than the statement by one of defendant's counsel that the defense knew of no testimony that would be improper to be heard in a public trial. Thereupon the trial was transferred to the small room, and the judge, the jury, defendant, his counsel, a number of the bar and newspaper men, and the witness Grimes, went to the small room, where the court was opened, and by order of the court the general public was excluded during the taking of the testimony by the state in chief, and in reply or rebuttal, save as to one witness, a physician.

The right of a person accused of crime to public trial is guaranteed by the constitution, article 1, section 10, the provision being that: "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." The term "public," in its enlarged sense, takes in the entire community, the whole body politic, and a public trial means one which is not limited or restricted to any particular class of the community, but is open to the free observation of all. This does not impose upon the authorities a <sup>263</sup> duty to provide so large a place for public trials as would accommodate every member of the community at the same time, for that would be plainly impracticable, but it does import a duty to make reasonable provision in that regard, and this requirement is usually met by ample accommodations for the purpose. And these considerations suggest the duty of courts, when trying persons accused of crime, to avail themselves of the means thus furnished, but suggest further that the entire public may not be present at such trial. Provisions respecting a public trial similar to that of our constitution above quoted are found in the federal constitution and in most, if not all, of the constitutions of the states of the Union, and a number of decisions have been rendered by courts of last resort involving the question, although it seems not to have been a frequent subject of judicial decision. Text-writers have also written upon it. The necessity for such provisions arose from the *flagrant*

abuses which disgraced some of the courts of England prior to our American Revolution, and their purpose manifestly is to protect the rights of persons accused of crime. No universal rule, however, has been established which is sure to apply to all situations. Probably the rule given by Cooley, in his work on Constitutional Limitations, sixth edition, 379, is as safe a guide as any met with in the books. It is: "It is also requisite that the trial be public. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial <sup>264</sup> on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether."

Assuming that the rule above indicated governs the case, it is manifest that the order of exclusion made by the trial judge was in excess of the power of the court in the premises. It permitted the admission of a very limited class of the public and excluded all others. Without doubt the object which was sought to be attained was in all respects, save the one above indicated, highly commendable. The nature of the charge and the opening statements of counsel indicated that revelations from the witness-stand would be indecent in a marked degree, and the sequel, as shown by the record, fully bore out the unpleasant anticipations of the judge. No possible good to the community could result by giving publicity to such vile and filthy details, but much probable harm, <sup>265</sup> and especially would this result follow if the testimony

were listened to by young people. Had the court continued its sessions in the general courtroom, and had the order excluded all youths, and allowed free entrance to the courtroom by others, probably no valid exception to the order could have been taken. It is not intended here to indicate that the trial judge is without power to exclude from the courtroom during the trial of a criminal case individuals, though adults, who are, by reason of habits or physical condition, personally obnoxious, or persons who by their conduct interrupt the orderly course of business, or the power to clear the room of general spectators who, as in *Grimmett v. State*, 22 Tex. App. 36, 58 Am. Rep. 630, 2 S. W. 631, were so boisterous and insubordinate as to intimidate witnesses, and where it was impossible to distinguish those who participated from those who did not; nor is it doubted that persons whose attendance is for the express and only purpose of using the information thus obtained in a way calculated to directly obstruct the administration of justice may be excluded. Perhaps, too, the character known as the "courtroom loafer," whose attendance would be induced only by prurient curiosity, might be excluded without harm to the defendant, or prejudice to the state, although the matter of determining with certainty just who should, and who should not, be included in this category in the given instance, might not always be easy of solution. Much should be, and we think is, necessarily and properly left to the trial judge, who is obliged to insist upon the orderly conduct of the public business, and whose highest duty is the securing to the parties, the defendant as well as the <sup>208</sup> state, a fair and impartial trial; but the people have the right to know what is being done in their courts, and free observation and the utmost freedom of discussion of the proceedings of public tribunals that is consistent with truth and decency tends to the public welfare. We agree with the holding of the circuit court in the case at bar that the order of exclusion was too general in character and its limitations of admission too restrictive, and that the defendant was not accorded such a public trial as is guaranteed by the constitution.

It is, however, insisted by counsel for the state that because no specific objection or exception was entered by the defendant at the time the order was made or was being enforced, the error, if any was committed, cannot now be taken



advantage of. This objection ignores the force and effect of the constitutional provision. The right to a public trial is guaranteed. It is of the same high order of right as the other guaranties embodied in the section: that to appear and defend in person and with counsel; that to meet the witnesses face to face and have compulsory process, and that to a trial by jury. The right cannot be waived by silence any more than can the right to be tried by jury where the accusation is a felony and the plea is not guilty. This right should not be confused with a claim sometimes made that a reversal should be ordered where a jury has been obtained in a way not strictly conforming to the statute. The manner of selecting the jury is matter of procedure only, and this court has often held that objection to the mode must be made at the time, but <sup>267</sup> that an impartial jury must be obtained, and if that result is reached the accused is not harmed.

2. At the conclusion of the state's testimony in chief the defendant moved the court to require the state to elect upon which count of the indictment it would rely for conviction, and also to elect upon what occurrence, or the date of the transaction in regard to which testimony had been given, it would rely. The first part of the motion was overruled by the court, and the second sustained. The state thereupon elected to rely upon a date stated, and the cause proceeded upon both counts of the indictment, thus leaving it to the jury to determine, in the event the state had made a case against the defendant, upon which count he was guilty. The overruling of the first part of defendant's motion was found by the learned circuit court to be erroneous. In this conclusion we do not agree with that court. The rule respecting criminal pleadings in Ohio permits the joining of two or more counts where the offenses charged are closely related and arise from one transaction. Both characteristics were apparent in this case. This form of pleading may be necessary in order to provide for every possible variation in the evidence, and is common practice. And if such a form of indictment may be permitted, it would follow that the jury should pass upon the question of which grade of the offense charged, if either, the defendant had been proven guilty. Authorities to sustain this proposition are abundant. We cite only *Bailey v. State*, 4 Ohio St. 440, and *State v. Bailey*, 50 Ohio St. 636, 36 N. E. 233.

3. The court charged the jury that they might find a general verdict of guilty upon both counts <sup>268</sup> if they should find the evidence to be of such character as to warrant a conviction upon either. Thereupon the jury returned a general verdict of guilty. This charge was based upon the theory that the indictment in fact charges but one crime, and whether the offense was committed with consent or against the will of the female was immaterial. It is true that the crime is denominated rape whether committed forcibly or by consent. Considering the sections under which this indictment was found, it is manifest that the object sought is the protection of young girls, and the precise thing intended to be discouraged, and punished if committed, is sexual intercourse between males of eighteen years and upward with females of less than sixteen years. In this aspect the question of force or consent is immaterial. But that is not all of it. The statute (Revised Statutes, section 6817) provides in the one case punishment by incarceration in the penitentiary not more than twenty nor less than three years, and in the other like imprisonment not more than twenty years nor less than one year, or six months in the county jail or workhouse. This difference as to punishment distinguishes the two grades of the offense: it expresses the legislative judgment that the same act done by force is of a more heinous character than if done with consent, as manifestly it is, and so deserving of severer punishment. It would seem, also, to follow that the defendant was entitled to know by the verdict of a jury of what exact grade of crime he had been convicted. It would follow, further, that the jury should, as a guide to the court in awarding punishment, determine and fix by the <sup>269</sup> verdict the grade of crime which the testimony showed the defendant had committed. The charge should have directed that if found guilty on either count a verdict of guilty upon that count and not guilty upon the other should have been returned. It was not possible that the defendant could have been guilty on both. It was held by this court in *State v. Carl*, 71 Ohio St. 259. 73 N. E. 463, that upon the trial of an indictment charging the commission by the defendant Carl of a like act with consent evidence tending to show that it was committed without consent was not a fatal variance. This holding is based upon the peculiar wording of the statute, which, as above indicated, carries the implication that the manifest intent of the legis-

lature was to declare that the offense covered by the statute is established by proof that the act was either with consent or without. It is insisted that the above case requires a conclusion different from the one above stated as to this phase of the case at bar. We think not. The court's charge, we think, was erroneous. Inasmuch, however, as the sentence was of the minimum character, it may be that no essential prejudice to the defendant resulted, and were there no other error the judgment of the common pleas might be affirmed.

Judgment of the circuit court reversing the judgment of the court of common pleas is affirmed.

Shauck, C. J., Price, Crew and Summers, JJ., concur.

Davis, J., concurs in the judgment on the ground stated in paragraph 3 of the syllabus.

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*The Right of One Accused of Crime to a Public Trial* is discussed in *Jackson v. Commonwealth*, 100 Ky. 239, 66 Am. St. Rep. 336; *People v. Hartman*, 103 Cal. 242, 42 Am. St. Rep. 108; *People v. Murray*, 89 Mich. 276, 28 Am. St. Rep. 294, and note.

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## COCKLEY MILLING COMPANY v. BUNN.

[75 Ohio St. 270, 79 N. E. 478.]

**WITNESS—Testimony Against Deceased Person.**—In an action by a corporation against an executor or administrator, the general manager of the company is not disqualified to testify under the rule that a party shall not be allowed to testify, where the adverse party is an executor or administrator, of facts which occurred before the death of the decedent. (p. 745.)

Hustin & Marquis, for the defendant in error.

F. D. Levering, for the defendant in error.

**SUMMERS, J.** The milling company, a corporation, contracted with the defendant's decedent for four cars of oats, three to be delivered in the month of July and one in the month of August, 1901. But one car was delivered. The milling company sued for and recovered the difference between the selling price and the market price at the time for delivery. The contract was made by conversation, by telephone, between the general manager, who was also the secre-

tary and treasurer, of the milling company, and the defendant's decedent. The court of common pleas overruled an objection to the competency of the general manager to testify as to the conversation, and he so testified. The circuit court reversed on the ground that in this ruling the trial court erred.

At common law for nearly two hundred years an interested person was disqualified to testify in his own behalf. The reason for the disqualification was the assumption that under such circumstances most persons would testify falsely,<sup>273</sup> and as there was no certain test whereby the jury might discover the truth, that it was expedient to exclude all such witnesses.

The fallacy of this assumption was pointed out by Bentham and others, and on August 22, 1843, by an act entitled, "An act for improving the law of evidence" (6 & 7 Victoria, c. 85), since known as Lord Denman's act, the disqualification was removed in England, and since then in the federal courts by act of Congress and by statute in each of the states in this country. In 1851 the disqualification of parties was removed in England by the adoption of Lord Brougham's bill (14 & 15 Victoria, c. 99), and shortly thereafter similar acts were passed in this country. But in the act of Congress and in the statute of nearly every state, either in the statute abolishing the disqualification or in one shortly thereafter enacted, an exception was made, so that a party is excluded from testifying, where the adverse party is an executor or administrator, as to facts transpiring before the death of his decedent.

The reason for the exceptions is thus stated by Gholson, J., in *Stevens v. Hartley*, 13 Ohio St. 525: "Section 313 of the code is in the nature of a statute against frauds and perjuries. The testimony of the party to the action, though generally admissible, is excluded when it relates to transactions between him and a deceased person, against whose estate he asserts a claim. It was considered that there would be a temptation in such a case to fraud and perjury, against which protection should be given by excluding the testimony": See also, *Louis' Admr. v. Easton*, 50 Ala. 470; *Owens v. Owens' Admr.*, 14 W. Va. 88.

<sup>274</sup> That the exceptions are equally indefensible with the original rule is pointed out by Professor Wigmore in his

learned work, Wigmore on Evidence, section 578, where the whole matter is treated, and he well says of these exceptions: "As a matter of policy, this survival of a part of the now discarded interest qualification is deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words."

In *St. John v. Lofland*, 5 N. Dak. 140, 64 N. W. 930, Corliss, J., says: "Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them, by destroying the evidence to prove such claim, than there would be fictitious claims established if all such enactments were swept away and all persons rendered competent witnesses."

In this state the substance of Lord Denman's Act was enacted in 1850 (48 Ohio Laws, 33). Section 3 is as follows: "No person offered as a witness shall be excluded by reason of his or her interest in the event of the action; but this section shall not apply to a party to the action, nor to any party for whose immediate benefit such action is prosecuted or defended, nor to any assignee of a thing in action, assigned for the purpose of making him a witness."

This section was under consideration in *Lawson v. Farmers' Bank of Salem*, 1 Ohio St. 206. In that case two stockholders, also directors, in the plaintiff corporation were <sup>275</sup>permitted to testify against the objection of the defendant. It was ruled that they were not parties within the meaning of the statute. In the opinion it is said that the disqualification because of their interest was removed by the statute, and that being stockholders and directors did not make them parties, that they were not named as parties upon the record, and that they were not within the exception of "any party for whose immediate benefit such action is prosecuted or defended."

Prior to the legislation removing the disqualifications of parties to testify, the officers and stockholders, not named as parties in the record, in a corporation, a party, were not disqualified as parties, but only as being interested, and it remains to ascertain whether the general assembly in its efforts to remove the disqualifications of parties has disqualified persons who were theretofore competent.

Following Lord Brougham's act the disqualifications of parties in this state were partially removed by our Civil Code of 1853 (51 Ohio Laws, 57).

Section 310 provided that in any civil action no person shall be disqualified as a witness by reason of his interest in the same, as a party or otherwise. And section 313 reads: "No party shall be allowed to testify by virtue of the provisions of section 310, where the adverse party is the executor, or administrator, of a deceased person, when the facts to be proved transpired before the death of such deceased person."

The provisions of the code recognize both parties and persons having an interest, so that it is <sup>276</sup> not permissible to conclude that officers and stockholders in a corporation, because interested, were intended to be comprised in the word "party": *Potter v. National Bank*, 102 U. S. 163, 26 L. ed. 111.

Since 1853 numerous amendments have been made of these provisions of the code, adding disqualifications of a party, but there has been no disqualification of the officers or stockholders in a corporation. In *Elliott v. Shaw*, 32 Ohio St. 431, Day, J., says: "Instead of providing, in general terms, that where one party to a transaction or matter in issue, is unable, for any cause, to testify, the other shall also remain silent, the common-law disqualification of a party from testifying, removed by section 310, has been restored by section 313 only by successive enactments, cautiously confined, in each instance, to a particularly specified circumstance."

These various disqualifying provisions were treated as exceptions to the statute removing the disqualification, and consequently were strictly construed. In 1880 these provisions of the code appear as sections 5240, 5241, 5242 of the Revised Statutes, and it was provided in section 5242 that "when a case is plainly within the law and spirit of the last three sections, though not within the strict letter, their principles shall be applied." It will be observed that the law is not that the exceptions are to be multiplied by judicial construction, but that the principles of the three sections shall be applied when a case, not within the letter, is plainly within their reason and spirit. Accordingly, in *Cochran v. Almack*, 39 Ohio St. 314, it was ruled that: "A defendant is a competent witness to transactions with a <sup>277</sup> deceased agent of plaintiff." Johnson, C. J., says (page 316): "It follows that if a case is provided for, by the terms of either of the sections, no occa-

sion can arise for invoking the spirit and reason of the statute to supply the omission of its letter or terms."

To the same effect is what he says in *Sternberger v. Hanna*, 42 Ohio St. 305. These cases are followed in *First Nat. Bank v. Cornell*, 41 Ohio St. 401; *Keyes v. Gore*, 42 Ohio St. 211; *Shaub v. Smith*, 50 Ohio St. 648, 35 N. E. 503.

But it is contended that as a corporation can act only by an agent, the exception can have no application to a corporation unless the agent who acts for it is excluded. This may be true, but in view of the fact that a number of exceptions have from time to time been added to the statute, and, in view of the fact that in some states the agents of corporations are in such cases expressly excluded, the contention tends to establish only a *causus improvisus* which is no warrant for judicial legislation.

The following cases support the conclusion: *New Jersey Trust etc. Co. v. Camden Safe Deposit etc. Co.*, 58 N. J. L. 196, 33 Atl. 475; *Grange Warehouse Assn. v. Owen*, 86 Tenn. 355, 7 S. W. 457; *Colonial etc. Mtg. Co. v. Thedford*, 21 Tex. Civ. App. 254, 51 S. W. 263; *Ullman v. Brunswick Title Guarantee etc. Co.*, 96 Ga. 625, 24 S. E. 409; *Rosser v. Georgia Pac. Ry. Co.*, 102 Ga. 164, 29 S. E. 144; *Cody v. First Nat. Bank of Gainesville*, 99 Ga. 405, 27 S. E. 714; *Rust v. Bennett*, 39 Mich. 521; *City Sav. Bank v. Enos*, 135 Cal. 167, 67 Pac. 52; *Merriman v. Wickersham*, 141 Cal. 567, 75 Pac. 180; *In re Will of Bruendl*, 102 Wis. 45, 78 N. W. 169; *Fidelity & 278 Casualty Co. v. Goff's Ex.*, 17 Ky. Law Rep. 214, 30 S. W. 626.

The general manager of the plaintiff corporation was not, therefore, incompetent to testify on the ground that the defendant was an administratrix, and the circuit court erred in reversing the judgment of the court of common pleas on that ground.

Judgment of the circuit court is reversed and that of the common pleas affirmed.

Shauck, C. J., Price, Crew, Spear and Davis, JJ., concur.

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*A Defendant will not be Permitted to Testify*, under the statutes of Wisconsin, to conversations between himself and an agent of the plaintiff who died prior to the trial: *Meyer v. Hafemeister*, 119 Wis. 539, 100 Am. St. Rep. 900. But in Missouri a person who makes a contract with two partners, together with the surviving partner who was present when the contract was made, is competent to testify

about the contract after the death of the other partner: *Vandergrif v. Swinney*, 158 Mo. 527, 81 Am. St. Rep. 325. For other authorities discussing evidence of transactions with deceased persons, see *Mallow v. Walker*, 115 Iowa, 238, 91 Am. St. Rep. 158; *Minnis v. Abrams*, 105 Tenn. 662, 80 Am. St. Rep. 913; *Furenes v. Eide*, 109 Iowa, 511, 77 Am. St. Rep. 545; *Sloan v. Hunter*, 56 S. C. 385, 76 Am. St. Rep. 551; *Witte v. Koeppen*, 11 S. Dak. 598, 74 Am. St. Rep. 828.

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### PENNSYLVANIA COMPANY v. MEHAFFEY.

[75 Ohio St. 432, 80 N. E. 177.]

**RAILROADS—Lien on for Materials, Hay and Grain.**—A statute giving a lien on railroads for materials furnished has reference to materials furnished for use in the construction of the road so as, in a sense, to become a part of it, and does not include hay, grain and straw furnished a contractor for keeping teams employed by him in working on the road. (p. 754.)

**RAILROADS—Liability for Supplies Furnished Contractors.**—A notice posted by a railroad company, at a point where construction work is being done on its road, that it will "protect all claims for materials, labor and board," does not include a claim for hay, grain, straw and feed furnished a contractor for teams employed by him in the work. (p. 755.)

S. S. Wheeler and Allen Zollars, for the plaintiff in error.

Sprague & Lippincott and I. S. Motter, for the defendant in error.

**433 CREW, J.** On October 25, 1902, the defendant in error, R. MehaFFEY, filed his petition against the Pennsylvania Company in the court of common pleas of Allen county, Ohio, charging in said petition, as and for his cause of action: "That the defendant, Pennsylvania Company, is a corporation duly created under the law, and as such corporation, before and at the time of the facts hereinafter mentioned, to wit, on the first day of January, 1900, was the owner and in possession of a certain railroad and was operating the same into and through Allen county, Ohio; that at the date herein above named, and for a long time thereafter, said defendant was constructing sidetracks, switches, and making other improvements to and upon its said railroad right of way within the county aforesaid; that such work was under the management of Overstreet & Styles, assignees of Dorwin, Young & Co.;



that there was necessarily a large number of men, horses and mules employed by said Overstreet & Styles in and about the work herein alleged; that at the special instance and request of the said Overstreet & Styles, this plaintiff furnished, for the construction and improvements herein averred, material, hay, corn and other provisions for said men, horses and mules, aggregating four hundred and ninety-one dollars and thirty-one cents (\$491.31) on account, a copy of which is hereto annexed and herewith filed, marked 'Exhibit A.' [Which exhibit shows that the only articles furnished by plaintiff, which are here involved, were hay, corn, straw and feed.]

434 "Plaintiff further avers that for several months prior to the twenty-third day of March, 1900, the said Overstreet & Styles had failed to make prompt payments of amounts due and owing by them to the persons who had performed labor and furnished materials, supplies and other provisions upon and to the work aforesaid, whereby the prosecution and completion of the said work was greatly hindered and delayed; that the aforementioned creditors of the said Overstreet & Styles, among whom was this plaintiff, were insisting upon the payment of their claims which were due and unpaid by the said Overstreet & Styles, and were threatening legal proceedings against them to compel the payment of the same; that thereupon and to prevent the institution of said legal proceedings and further hindrance to and delay of the work aforesaid, the Pennsylvania Company, there being then in its possession a portion of the contract price which it was to pay for said work, caused a written notice to be posted in the village of Lafayette, Allen county, Ohio, and other places within said county and state, a copy of which notice is hereto attached, herewith filed, and marked 'Exhibit B.' "

(Said Exhibit B is in the words and figures following:)

"PENNSYLVANIA LINES WEST OF PITTSBURG.

"Date, 3-23, 1900. Fort Wayne. Time, 5:20 P. M.

"To Agent Pennsylvania Company:

"Dear Sir—Post notice that Pennsylvania Company will protect all claims for material, labor and board.

"F. A. ZOLLARS."

435 "That said notice was an agreement on the part of the defendant herein to protect and pay the said creditors of the said Overstreet & Styles, including this plaintiff, where-

by the defendant became liable to the plaintiff in the amount above stated.

"Plaintiff further avers that, relying upon the said written notice and in consideration thereof, he released and turned over to the said Overstreet & Styles some twenty head of horses and mules then in his possession, which he would have retained until his claims were paid, only for the posting of the notices herein alleged; and that after the posting of the said notice, he continued to furnish for said work further materials, hay, corn and other provisions at the request of said Overstreet & Styles.

"Plaintiff further avers that after the posting of said written notice, and on or about the fifteenth day of April, 1900, the said defendant, by its authorized agent, in compliance with the said written notices posted as aforesaid, came to Lafayette and paid off a large number of said creditors' claims and promised within a short time thereafter to return and pay the remaining claims, including the claims of this plaintiff; and that the plaintiff's claim was similar to those of the said creditors which were paid by the defendant.

"Plaintiff further avers that relying upon the said written notice and request of the said defendant, and the representation of the agent paying said claims at Lafayette, and believing that said defendant would fully perform and carry out its said agreement, he did not institute any legal proceedings to secure the payment of his claim, and refrained from in any way hindering and obstructing <sup>436</sup> the speedy completion of the work aforesaid, and did not take any legal action by filing an affidavit with the recorder of Allen county, Ohio, to perfect his lien against the said defendant for materials, hay, corn, and other provisions furnished as herein stated, as the plaintiff could and would have done but for the posting of said written notices and representations of the said agent.

"Plaintiff further avers that the claim herein set forth is long since due; that he has requested of the defendant the payment thereof, and that the same remains wholly unpaid; and that the said plaintiff is justly entitled to the said sum of four hundred and ninety-one dollars and thirty-one cents (\$491.31), together with interest thereon from April 11, 1900.

"Wherefore, said plaintiff asks judgment in the sum of four hundred and ninety-one dollars and thirty-one cents (\$491.31), and interest and all other relief."

To this petition the Pennsylvania Company answered as follows:

"Now comes the defendant, Pennsylvania Company, and for answer to plaintiff's second amended petition says, it admits that it is a corporation duly incorporated under the laws of the state of Pennsylvania, and that on the first day of January, 1900, and for a long time prior to, and ever since, it has been operating the Pittsburg, Fort Wayne and Chicago Railway as lessee, and that said railway passes through Allen county, Ohio, and that on the first day of January, 1900, it was constructing sidetracks, switches, and making other improvements <sup>437</sup> upon said railroad right of way within said county, and it denies each and every allegation in said amended petition contained not herein specifically admitted, and prays to be hence dismissed with its costs."

Upon the issues joined by the pleadings aforesaid, trial was had in the court of common pleas, which resulted in a verdict and judgment for the plaintiff MehaFFEY, in the sum of five hundred and forty-four dollars and eighty cents. This judgment was subsequently affirmed by the circuit court. The Pennsylvania Company prosecutes error in this court, asking a reversal of said judgment of affirmance.

<sup>441</sup> In the present case, aside from the averment in the petition (unsupported by any evidence) that the Pennsylvania Company by its authorized agent expressly promised to pay the claim here in suit, there is in this case neither allegation nor proof of any liability on the part of said company to compensate R. MehaFFEY for the hay, corn, straw and feed furnished by him to Overstreet & Styles, except such as can be predicated upon, or results from, the posting by the Pennsylvania Company at the village of Lafayette in Allen county, Ohio, and at other places within said county, of the following telegram or notice, to wit:

"PENNSYLVANIA LINES WEST OF PITTSBURG.

"Date, 3-23, 1900. Fort Wayne. Time, 5:20 P. M.

"To Agent Pennsylvania Company:

"Dear Sir—Post notice that Pennsylvania Company will protect all claims for material, labor and board.

"F. A. ZOLLARS."

The language of this telegram, when construed most favorably for the plaintiff below, MehaFFEY, in terms imposes upon

the Pennsylvania Company no obligation or duty other than that of protecting and paying all such claims as properly belong to and fall within one or the other of the classes therein designated, namely, claims for material, labor or board. That the claim in suit in this case <sup>442</sup> was not one for labor or board is conceded. But it is insisted that within the terms of the above telegram, and within the meaning of the statutes hereinafter referred to, the hay, corn, straw and feed furnished by Mehaffey to Overstreet & Styles were materials; and that Mehaffey's claim for the articles so furnished became, and was therefore, one of the claims which the Pennsylvania Company in said telegram expressly assumed to protect and pay. Directly the contrary view is urged by counsel for the railroad company, who contend that the word "material" as used in the telegram, and as employed in the statutes in connection with the construction of railroads, has, and had at the time said telegram was sent and posted, a fixed, well-defined and commonly understood meaning, which was and is, that the word or term when thus used is descriptive of and includes such articles only as are furnished for, and are to be used in, the construction of the road, and that it does not comprehend or embrace articles furnished or supplied for any other purpose; such as feed furnished for teams working upon the railroad, or merchandise, clothing or board furnished the laborers employed thereon. On the trial of this cause in the court of common pleas, counsel for the Pennsylvania Company requested the court to give to the jury the following instruction: "No. 1. Gentlemen of the Jury: I charge you, as a matter of law, that the hay, corn, feed, straw and rent set up in the itemized account of plaintiff is not covered or included in the words 'labor, material and board,' set out in the telegram which is introduced as evidence in this case." This instruction the court refused to give, and in the general charge <sup>443</sup> instructed the jury as follows: "Now, gentlemen, . . . I might say, before closing, that if you find this telegram was posted by the authority of the company, and if you find that the plaintiff in this case furnished hay, grain, straw and other feed and materials of that character to the contractor or subcontractor for the use of his horses upon the work, that the plaintiff would be considered as having furnished material, within the meaning of the terms of this telegram, and he would be entitled to

recover." The refusal of the court to charge as requested, and the giving by the court of the above instruction, are among the errors here assigned. A determination of whether or not the action of the court in this behalf was erroneous necessarily involves a consideration of the purpose and provisions of sections 3207, 3208, 3209, 3210 and 3211 of the Revised Statutes. Section 3207 provides what contracts for railroad work shall stipulate, and makes the contractor liable to persons performing labor or furnishing materials stipulated for in the contract with the owner of the road. But it makes no provision for a lien upon the road, nor does it impose any liability on the railroad company for the labor so performed or the materials so furnished. Section 3208 provides: "A person who performs labor or furnishes materials for or in construction of any railroad, depot buildings, water-tanks, or any part thereof, and a person who furnishes boarding on the order of any contractor or subcontractor, to persons employed by them, or either of them, in furnishing materials or performing labor for or in construction of such railroad, depot buildings, water-tanks, or any part thereof, in addition to his rights under <sup>444</sup> the preceding section shall have a lien for the payment of the same upon such railroad, and such lien shall have and maintain precedence over any lien taken, or to be taken, and shall subsist for one year from the date of filing the attested account hereafter provided for; and if an action is brought to enforce the lien within that time, it shall continue in force until finally adjudicated." It further provides and points out what shall be done in order to perfect such lien. Sections 3209 and 3210 provide how actions may be brought for the enforcement of liens, provide for notice to the contractor or subcontractor, and the adjustment of disputed claims, and are merely sections governing procedure. Section 3211 provides as follows: "The provisions of the four preceding sections shall apply to and include any person who furnishes grain, hay, merchandise, tools or implements, or who repairs any tools or implements, on the order of any contractor or subcontractor, for their own use, or the use of persons employed by them or either of them, while furnishing materials or labor for or in construction of such railroad; provided, that the amount of such claim shall not exceed the wages of the person performing labor or furnishing materials, to whom furnished, or the amount found

due such contractor or subcontractor, under the provisions of section thirty-two hundred and seven; and in every such case, the requirements of section thirty-two hundred and eight, as to filing affidavits and giving notices, shall be strictly complied with; and, provided further, that the aggregate of all liens taken and perfected under sections thirty-two hundred and seven, thirty-two hundred and eight, thirty-two <sup>445</sup> hundred and ten, and thirty-two hundred and eleven, shall not be in excess of the actual construction contract price of the railroad company. The word 'owner' in these sections shall be held and considered as including any lessee, receiver, corporation, company, or persons owning, operating or managing any railroad, with whom or in whose behalf the contracts herein have been made." While this section in terms extends the provisions of the four preceding sections to such persons as furnish grain, hay, merchandise, etc., on the order of a contractor or subcontractor for their use or the use of persons employed by them or either of them while furnishing material or labor for or in the construction of such railroad, it does not enlarge or extend the meaning of the word "material" as employed and used in the preceding sections, nor does it impose upon the railroad company any personal liability for the claims of persons furnishing the articles therein mentioned, unless a lien be taken therefor agreeably to its provisions. The sole purpose and effect of this enactment, apart from declaring the meaning of the word "owner," is to provide for the giving of a lien upon the railroad, to the limited extent therein provided, to persons furnishing on the order of a contractor or subcontractor as aforesaid, any of the articles in said section enumerated, the furnishing of which, but for this statute, would not entitle the person so supplying the same to have or take a lien therefor. The statute is itself, therefore, a legislative declaration that hay, grain, merchandise, tools, etc., are not materials, and that they are not within the intent and meaning of that term as employed and used in the preceding <sup>446</sup> sections. All of the aforementioned sections are parts of an act passed by the legislature April 6, 1883 (80 Ohio Laws, 99). On April 10, 1884 (81 Ohio Laws, 126), the legislature passed an act declaratory of the true intent and meaning of the aforesaid sections, which act reads as follows: "The true intent and meaning of sections thirty-two hundred and seven, thirty-two

hundred and eight, thirty-two hundred and nine, thirty-two hundred and ten and thirty-two hundred and eleven of the Revised Statutes of Ohio, as amended April 6, 1883, is hereby declared to be as follows: Any person or persons who perform labor or furnish material or boarding, under contract, express or implied, with such railroad company, or any of its authorized agents, for the construction of such railroad, or any part thereof, is entitled to a lien for the payment of the same upon such railroad, as provided in section thirty-one hundred and eight of the above-recited act." In the case of *Industrial etc. Guaranty Co. v. Electrical Supply Co.*, 58 Fed. 732, 7 C. C. A. 471, Swan, Judge, reviewing and construing the above enactment, and also section 3208 of the Revised Statutes, says: "By section 3208 of the Revised Statutes of Ohio it is provided that 'a person who performs labor or furnishes material for or in the construction of any railroad, depot buildings, water-tanks, or any part thereof, to a contractor or subcontractor, . . . shall have a lien for the payment of the same upon such railroad.' . . . This statute gives a lien upon the railroad only for materials furnished a contractor or subcontractor, for or in the construction of such railroad, depot buildings, and water-tanks, or any <sup>447</sup> part thereof. For whatever other structures materials may be furnished, no lien is given under this act.

"The act of April 10, 1884, declaratory of the meaning of section 3208, above cited, enlarges the list of those entitled to a lien, by enacting that the true intent and meaning of those sections is that 'any persons who perform labor or furnish material or boarding under contract, express or implied, with such railroad company, or any of its authorized agents, for the construction of such railroad, or any part thereof, is entitled to a lien for the payment of the same upon such railroad, as provided in section 3108 (?) [3208] of the above-recited act.' The only effect and purpose of this latter act was to give a lien under section 3208 as well to persons furnishing materials directly to or performing labor under contract with a railroad company, as to those who dealt with contractors and subcontractors, who were protected by section 3208. Neither act, however, purports to give a lien upon a railroad for anything not used in its construction as a railroad or that of its depot buildings or water-tanks." That the general rule of construction is, that statutes giving a lien upon the

railroad for materials furnished, should be limited to materials that are furnished for and to be used in the construction of the road, so as in a sense to become a part of it, would seem to be well settled by a uniform line of decisions, of which we cite the following as a type: *Central Trust Co. v. Texas etc. Ry. Co.*, 27 Fed. 178; *Dudley v. Toledo etc. R. R. Co.*, 30 Am. & Eng. R. R. Cas. 236; *Stewart Chute Lumber Co. v. 448 Missouri Pac. R. R. Co.*, 33 Neb. 29, 49 N. W. 769; *Bas-shor & Co. v. Baltimore etc. R. R. Co.*, 65 Md. 99, 3 Atl. 285; *Ferguson v. Despo*, 8 Ind. App. 523, 34 N. E. 575; *Knapp v. St. Louis etc. Ry. Co.*, 6 Mo. App. 205. Having regard, then, for the well-defined and established meaning of the term as employed in the statutes, it must be held that the hay, grain, straw and feed furnished by Mehaffey to Overstreet & Styles were not materials either within the meaning of the statute or the intent and language of the telegram posted by the Pennsylvania Company, upon which this suit was predicated. And if not materials, then Mehaffey's claim for the articles so furnished was not within the terms of the telegram, and the sending and posting of said telegram—there being no allegation of fraud or attempt to mislead thereby—created no obligation against, neither did it impose any liability upon, the Pennsylvania Company to protect or pay Mehaffey's claim, or any claims of like character. Whether, then, Mehaffey, as averred in his petition, because of his reliance upon said telegram, did not, until the bringing of the present suit, institute any legal proceedings to secure the payment of his claim, and forbore the filing of an affidavit with the recorder of Allen county to perfect his lien against the railroad company for the articles furnished and supplied by him to Overstreet & Styles, becomes wholly immaterial, for the reason that such facts, if proven in the present case, would in no wise either change or enlarge his rights against the railroad company. There being, then, in this case no liability on the part of the Pennsylvania Company to Mehaffey, except such as can rightfully 449 be predicated upon the sending and posting of the above-mentioned telegram, and Mehaffey's claim not being covered by, or within the terms of, said telegram, it follows that he is without right to recover in this case, and the trial court should have sustained the motion of counsel for the Pennsylvania Company—made at the close of the evidence—and should have directed a verdict in



favor of the defendant company. Not having done this, but having overruled said motion and submitted the case to the jury, the court should then have given to the jury above request No. 1, as asked by counsel for the Pennsylvania Company.

Upon an application for a rehearing in this case, it is stated by counsel for defendants in error that certain of the items of MehaFFEY's claim referred to in "Exhibit A" attached to his petition, amounting to twenty-one dollars and ten cents, are labor claims, and therefore within the express language and letter of the above telegram. And it is claimed that as to those items at least, MehaFFEY is entitled to recover in this case. It is perhaps a sufficient answer to this claim to say, that MehaFFEY's petition in the present case contains no allegation that these claims, or any of them, were labor claims, nor are they so denominated or described in "Exhibit A" attached to said petition. MehaFFEY's claim as shown by the averments of his petition, and as exhibited by schedule A thereto attached, is one for hay, grain, straw and feed furnished by him to Overstreet & Styles, or to other persons on their order and for which they were to pay. He does not ask, nor is he entitled in this case, to recover as owner or assignee of any claim for labor. There is a further, and we think equally conclusive, <sup>450</sup> answer to this suggestion of counsel for defendant in error, which is, that where, as in this case, a railroad contractor gives to a laborer in his employ an order upon a third party, by which such laborer obtains from said third party goods or merchandise to the amount of such order, the transaction is one of mere novation, whereby a new debt is created and the original debt, to the extent of the order, canceled and paid, and it cannot in law be treated as an assignment pro tanto of the laborer's claim to the person furnishing the goods or merchandise upon said order, so as to enable the latter to proceed against the railroad company under the statute as one owning and holding a claim for labor. In view of the conclusions above reached, it is unnecessary to dispose of the other questions argued, and they are not here considered. The judgment of the circuit court is reversed, and judgment will be entered for plaintiff in error upon the undisputed facts.

Shauck, C. J., Summers and Spear, JJ., concur.

*A Person who furnishes board to workmen employed in making brick under a contract with their employer does not perform labor or furnish materials for making the brick, entitling him to a mechanic's lien: Perrault v. Shaw, 69 N. H. 180, 76 Am. St. Rep. 160. And under a statute providing that every person furnishing material for any machinery, fixture or building has a lien therefor, illuminating oil, mica, grease, lubricating oil, and gasoline for fuel used in a mining plant, are not lienable, since each is consumed in use, and does not add to the value nor become a part of the property on which it is used: Holter Hardware Co. v. Ontario Min. Co., 24 Mont. 198, 81 Am. St. Rep. 421.*

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**PENNSYLVANIA.**

**VEIT v. CLASS & NACHOD BREWING COMPANY.**

[216 Pa. 29, 64 Atl. 871.]

**NEGLIGENCE, CONTRIBUTORY**—Evidence of.—In an action to recover for the death of an employé resulting from an explosion caused by some unknown person tampering with steam appliances, evidence that the deceased had, on previous occasions, tampered with such steam appliances to hasten his work is inadmissible, if there is no evidence to connect the deceased with the act immediately causing his death. (p. 758.)

**EVIDENCE of Similar Act**—The commission of the act charged against a person cannot be proved by showing a like previous act to have been committed by the same person. (p. 759.)

**J. M. Vanderslice and C. Vanderslice, for the appellant.**

**W. W. Smithers, for the appellee.**

**31 STEWART, J.** The immediate cause of the explosion which resulted in the death of the plaintiff's husband is not obscure. The steam gauge, just before the explosion occurred, registered a pressure in excess of twenty-five pounds, whereas the maximum of safety was from sixteen to eighteen pounds. This could not have occurred had the governor and safety valve been in working order. An examination made within a few minutes after the explosion showed that the regulator on the steam pump had been plugged with a large wrought-iron nail, that extra weights had been placed on the lever, and that the safety valve on the tank in the cold-storage room was tied down with a rope. That this was the work of a designing mind is beyond question. The evidence admits of conjecture, but nothing more, as to the purpose back of it. While it does not necessarily result from the fact that the appliances to the steam machinery were

found in this condition fifteen or twenty minutes after the explosion, and after a number of persons had been admitted to the room, that they were in the same condition when the explosion occurred, yet the evidence on this point was strongly persuasive of the fact, and its admission was not open to objection. Assuming this to be the true explanation of the explosion, where did the responsibility rest? The contention <sup>32</sup> on the part of the plaintiff was that, while it was chargeable in the first instance to the negligence of the defendant's night engineer, whose duty it was to observe the state of the gauge and keep the pressure within the limits of safety, the responsibility rests on the defendant because—and the evidence on this point was amply sufficient to establish a *prima facie* case—the night engineer in charge was a man given to habits of intoxication, a circumstance that was known, or should have been known, to the defendant, and that he was in point of fact under the influence of liquor during the night of the accident, to an extent that made him incompetent for the work assigned him. The effort on the part of the defense was not only to meet and overcome the testimony of the plaintiff with respect to these matters, but to refer the interference with the appliances to the steam machinery, directly to the plaintiff's husband who was killed. It is in connection with the latter effort that we have this appeal.

Of course, if it was plaintiff's husband who, on his own responsibility and for his own purposes, disarranged the machinery in a way that resulted in the explosion, no liability could attach to the defendant, however much the incompetency or negligence of the night engineer may have contributed. As a distinct fact in the case the jury were allowed to pass upon the question whether Veit did or did not tamper with the machinery in the way indicated. The finding was for the defendant generally, but inasmuch as several questions of fact were submitted, either one of which being found for the defendant would have determined the verdict as rendered, we cannot know what the jury's finding was with respect to this particular inquiry. It may have been, for all we know, the determining one, and it therefore becomes important to inquire as to the basis for the submission.

Veit was engaged in filling kegs with beer from the vats for the morning delivery. The time required for this work depended to some extent upon the air pressure in the vats; the greater the air pressure the more rapidly could the kegs be filled. A witness for the defendant testified that Veit had been discovered on several occasions, the most recent being about a month before the accident, interfering with the safety valve on the air pump; and that he had given as his reason <sup>33</sup> for so doing that it enabled him to get through with his work and return to his home at an earlier hour than he otherwise could; that he had been threatened with discharge if he repeated the interference, and had been cautioned that such interference might result in loss of life. This evidence was admitted under objection, and its admission is assigned for error.

Had there been any evidential fact connecting Veit with the explosion, this testimony would have been competent as showing the motive, as a supporting circumstance; but there was absolutely none. He was not shown to have said or done anything that connected him in any way with the condition of the machinery that occasioned the explosion, nor was there a single circumstance pointing in this direction. The jury were allowed to infer that his was the hand that plugged the governor and tied down the valve, solely because of his previous conduct as testified to. Clearly, this evidence was insufficient to warrant an inference that the interference was Veit's; and when offered as a distinct piece of evidence, unaccompanied by any offer to show any other implicating circumstance, it ought to have been rejected. It is an established rule, applicable alike to civil and criminal inquiries, that the commission of the act charged cannot be proved by showing a like act to have been committed by the same person. The rule is thus stated in Stephen's Digest of the Law of Evidence, article 10: "The fact which rendered the existence or nonexistence of any fact in issue probable by reason of its general resemblance thereto, and not by reason of its being connected therewith, is, deemed not to be relevant to such fact." A fuller statement of the rule is to be found in 1 Wigmore on Evidence, page 230: "Where the doing of the act is the proposition to be proved, there can never be a direct inference from an act or former

conduct to the act charged; there must always be a double step or inference of some sort, a *tertium quid*. In other words, it cannot be argued 'Because A did an act X last year, therefore he probably did the act X as now charged. Humanity being infinitely varied, there is no adequate probative connection between the two. A may do the act once, but may never do it again; and not only he may not do it again, but it is in no degree probable that he will do it again. The conceivable contingencies <sup>34</sup> that may intervene are too numerous.' . . . This principle has long been accepted in our law. 'That a doing of one act is in itself no evidence that the same or a like act was again done by the same person,' has been so often judicially repeated that it is commonplace." In 17 *Cyclopedia of Law and Procedure*, page 279, the same rule is stated in different terms. "Among inferences which, except under certain conditions, the law will not permit to be drawn, is that the person has done a certain act because he has done a similar act at another time. And the rule has repeatedly been asserted by the courts, and has been applied equally to civil and criminal cases." The application of this rule in our own cases has been frequent. It is necessary to refer to but a single one. In *Baker v. Irish*, 172 Pa. 528, 33 Atl. 558, the effort was to show that the plaintiff in the action, who had been injured in an elevator, and was suing for damages, had made a practice of jumping from the elevator while in motion. Rejection of the evidence was assigned for error. We quote from the opinion of Mr. Justice Dean: "There was no error in the ruling; what Baker had done before would warrant no inference, or one so remote, that he had done the same on the day of the accident, that the evidence was inadmissible. Says Wharton's *Law of Evidence*, section 40 and notes: 'Ordinarily, when a party is sued for damages, flowing from negligence imputed to him, it is irrelevant to prove against him other disconnected, though similar, negligent acts. . . . So, where the question in a suit against a railway company is whether a driver on a particular occasion was negligent, it is irrelevant to prove that he had been negligent on other occasions.' The same rule applies where the defense is that the injury was caused by plaintiff's own negligence. Men do not usually risk life and limb without motive, and

the fact that a man has done so once or oftener does not warrant the induction 'that he did so on the particular occasion in controversy.' "

It was error to admit the evidence. The second assignment of error is sustained; the judgment is reversed and a venire facias de novo awarded.

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*The Principal Case* affirms the principle declared in *Baker v. Irish*, 172 Pa. 528, 33 Atl. 538. For other authorities bearing upon this question, see *Cleveland etc. Ry. Co. v. Wynant*, 114 Ind. 525, 5 Am. St. Rep. 644; *McCasker v. Enright*, 64 Vt. 488, 33 Am. St. Rep. 938; *Broderick v. Higginson*, 169 Mass. 482, 61 Am. St. Rep. 296.

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### COMMONWEALTH v. IERADI.

[216 Pa. 87, 64 Atl. 889.]

**EVIDENCE—Witnesses—Instruction to Disregard Evidence.—**

It is reversible error for the court to instruct the jury in a criminal case that if they find that one of the witnesses has sworn falsely, then "such witness is not to be believed in any respect, and you have to disregard his testimony." (pp. 761, 762.)

**EVIDENCE—False Testimony.—**If a witness willfully and corruptly swears falsely to any material fact, the jury are at liberty to disregard the whole of his testimony, but the correct principle goes no further than this, and the jury should not be instructed that it must totally disregard his testimony. (p. 762.)

G. B. Munn, O. C. Allen and W. H. Allen, for the appellant.

C. W. Stone, W. S. Clark, district attorney, and R. W. Stone, for the appellee.

88 BROWN, J. Immediately after calling the attention of the jury to the deep interest of the appellants in the issue as affecting their credibility, the court said: "And where there is a conflict of testimony, it is your duty to reconcile the evidence, if you can, with the presumption that each man is telling the truth. But if you cannot, and if there is such a conflict of the evidence, and the evidence leads you to believe that one of the witnesses has sworn falsely and you arrive at the conclusion that he has, then such witness is not to be believed in any respect, and you have to discard his testimony." This was error which may have been very

serious in its effect on the jury. The appellants and their witnesses may have sworn falsely as to some facts which were not material, but, even if their testimony was false as to some material fact, the jury were not required to disbelieve them, as "*Falsus in uno, falsus in omnibus*," has modernly been relaxed and restricted in its application. The rule is, that if a witness willfully and corruptly swears falsely to any material fact in a case, the jury are at liberty to disregard the whole of his testimony: 30 Am. & Eng. Ency. of Law, 2d ed., 1072. But the correct principle goes no further than to say that the jury may disregard the testimony, not that they must disregard it. This<sup>89</sup> is the form of the rule as laid down in the great majority of jurisdictions: 2 Wigmore on Evidence, p. 1173. "There has never been any positive rule of law which excluded evidence from consideration entirely, on account of the willful falsehood of a witness as to some portions of his testimony. Such disregard of his oath is enough to justify the belief that the witness is capable of any amount of falsification, and to make it no more than prudent to regard all that he says with strong suspicion, and to place no reliance on his mere statements; but when testimony is once before the jury, the weight and credibility of every portion of it are for them, and not for the court to determine. The duty of the court is to give them such full cautions as will lead them to the intelligent performance of their functions": Knowles v. People, 15 Mich. 408. This is the correct rule.

When the jury were instructed that, if they found one of the witnesses had sworn falsely, "then such witness is not to be believed in any respect, and you have to discard his testimony," they must have understood the court as saying that they must disregard his testimony entirely. For this reason the first assignment of error must be sustained. The remaining three are overruled.

Each judgment is reversed and a venire facias de novo awarded.

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*The Maxim "Falsus in Uno, Falsus in Omnibus" is discussed in the note to Dunn v. People, 86 Am. Dec. 330. The jury should not be directed to reject altogether the evidence of a witness who has testified willfully false as to any fact. Such an instruction is too broad: Crabtree v. Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324. Compare Stoffer v. State, 15 Ohio St. 57, 86 Am. Dec. 470.*



## COMMONWEALTH v. MINNEY. .

[216 Pa. 149, 65 Atl. 1.]

**JURY—Challenge.**—A juror's conscientious scruples against capital punishment, or his preconceived opinion of the guilt or innocence of the accused, is a good ground of challenge. The test of such scruples or such opinion as a disqualification is the juror's own testimony as to his ability to throw aside their influence and render a verdict according to the evidence alone, but this test is not to be applied solely on the juror's own conclusion, and his ability as well as his willingness must be shown to the satisfaction of the trial judge who must be allowed a large measure of discretion. (pp. 763, 764.)

**JURY—Challenges for Cause.**—If a juror testifies that he has conscientious scruples against capital punishment, but that he would bring in a verdict according to the evidence alone, although it would worry his conscience, or do violence to his conscience, a challenge for cause is sustainable. (p. 764.)

**JURY—Right to Service of Particular Juror.**—A person accused of crime has no right to the service of any particular juror on his panel, and a legal and impartial jury is all that he is entitled to. (p. 764.)

**JURY—Challenge—"Fixed Opinion."**—Although a juror testifies that he has a fixed opinion, this does not disqualify him from serving on the jury if he declares that he can disregard such opinion, and be governed by the evidence alone. (p. 765.)

**TRIAL—Omissions to Charge on Evidence.**—If the court in its charge to the jury in reviewing the evidence omits or insufficiently refers to portions that counsel think material, it is the duty of the latter to call the court's attention to them before the case goes to the jury, so that the error, if there is one, may be corrected before it has done any harm. (p. 765.)

S. J. Morrow, R. F. Hopwood, D. M. Hertzog and R. M. Carroll. for the appellant.

T. H. Hudson, district attorney, and D. W. Henderson. assistant district attorney, for the appellee.

**150** Per CURIAM. The second and third assignments of error are for the court's sustaining the commonwealth's challenges for cause to jurors who had conscientious scruples against capital punishment. It has long been settled that such scruples are a good cause for challenge: Commonwealth v. Leshner, 17 Serg. & R. 155; and it is equally well settled that the test of such scruples as a disqualification is the juror's own testimony as to his ability to throw aside their influence and render a verdict according to the evi-

dence alone: *Commonwealth v. Valsalka*, 181 Pa. 17, 37 Atl. 405.

The same test is applicable to the disqualification by a preconceived opinion of the juror as to the guilt or innocence of the prisoner, which is the ground of the fourth assignment: *Commonwealth v. Taylor*, 129 Pa. 534, 18 Atl. 558, and cases there cited.

But this test, while in the nature of things the only one available, is not to be applied solely on the juror's own conclusion. He may honestly think he can disregard his scruples or his opinion, and may honestly try to do so; but his ability as well as his willingness must be shown to the satisfaction of the judge, and the latter must be allowed a large measure of discretion. "We cannot bring before us the tones, the manner and apparent <sup>151</sup> spirit and character of this juror, and for that reason we cannot review the influence such considerations exercised upon the mind of the learned judge": *Commonwealth v. Roddy*, 184 Pa. 274, 39 Atl. 211. "The established test is whether or not the juror can throw aside his impression or opinion and render an impartial verdict on the evidence alone. That question the juror alone can answer, and the weight of his answer is not to be determined exclusively by his words as they appear in print in the record, but by his words, manner, and bearing, as to which a fair measure of discretion must be allowed to the court below which had the juror before it": *Commonwealth v. Eagan*, 190 Pa. 10, 42 Atl. 374.

In the present case the two jurors who had conscientious scruples against capital punishment each testified that he would bring in a verdict according to the evidence, but it "would worry his conscience" or "would do violence to his conscience." The judge might very fairly doubt if the jurors had the ability to be entirely impartial though they might honestly make the effort. But even if he had no such doubt, he was right in holding that the law did not compel him to subject a juror to such a strain on his conscience. It was a proper exercise of his discretion.

But even if the discretion had been improvidently exercised the prisoner would not have been injured, for he had no right to the services of any particular juror on his panel and if he had a legal and impartial jury this was all he was entitled to: *Commonwealth v. Mosier*, 135 Pa. 221, 19 Atl.

943, and cases collected in Thompson and Merriam on Juries, sections 159, 251, and 271.

On the point made in the fourth assignment that the juror testified that he had a "fixed opinion," the case of Curley v. Commonwealth, 84 Pa. 151, is express authority that notwithstanding the juror's use of the term "fixed opinion," he was not disqualified if he still declared he could disregard it, and be governed by the evidence alone.

The other assignments do not require any detailed discussion.

The amendment of the record of the first trial was justified by the minute-book and merely conformed the record to the verdict as it was actually rendered.

We have constantly to remind counsel that where the judge in his charge, reviewing the evidence, omits or insufficiently refers <sup>152</sup> to portions that counsel think material, it is their duty to call the judge's attention to them before the case goes to the jury, so that the error, if there is one, may be corrected before it has done any harm.

The judgment is affirmed and the record is remitted to the court that execution may be had according to law.

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*Preconceived Opinions as a Ground for Challenging jurors* are discussed in the note to Smith v. Eames, 36 Am. Dec. 521. And bias as a ground for rejecting jurors is discussed in the note to Commonwealth v. Brown, 9 Am. St. Rep. 744. An opinion which disqualifies a juror in a criminal case is of that fixed character which repels the presumption of the innocence of the accused, who is already condemned in the juror's mind: People v. Barker, 60 Mich. 277, 1 Am. St. Rep. 501. See, too, People v. Gage, 62 Mich. 854, 4 Am. St. Rep. 854; State v. Gleim, 17 Mont. 17, 52 Am. St. Rep. 655. It is not error for a court to overrule a challenge of jurors who, on their voir dire, state that they have read in the newspapers what purported to be the facts of the case, and have formed and expressed some opinion therefrom upon the merits, but that it is not fixed and will not influence their verdict: State v. Kelly, 28 Or. 225, 52 Am. St. Rep. 777. See, too, State v. Sheerin, 12 Mont. 539, 33 Mont. 600.

*Conscientious Scruples Entertained by a Juror* which would prevent him from assenting or agreeing to a verdict subjecting the accused to capital punishment, although justified by the evidence, disqualify him: Williams v. State, 32 Miss. 389, 66 Am. Dec. 615; Hyde v. State, 16 Tex. 445, 67 Am. Dec. 630; Monday v. State, 32 Ga. 672, 79 Am. Dec. 314. However, the fact that a juror is opposed to capital punishment does not disqualify him, if he believes his duty as a juror will not thereby be interfered with: Commonwealth v. Webster, 5 Cush. 295, 52 Am. Dec. 711; note to Smith v. Eames, 36 Am. Dec. 532.

**BLACK v. BESSEMER AND LAKE ERIE RAILROAD COMPANY.**

[216 Pa. 173, 65 Atl. 173.]

**RAILROADS—Overhead Crossings—Duty as to Signals.**—If the risks and dangers of a railroad crossing at grade have been avoided by the construction of an overhead crossing, there is no imperative, unbending rule requiring the performance of duties, such as to ring a bell or blow a whistle upon approaching the crossing, demanded where the danger is greater, as at such grade crossing. (p. 767.)

**RAILROADS—Overhead Crossings—Duty as to Danger Signals.**—If a traveler approaching an overhead railway crossing has a clear view of the railroad for a distance of fifteen hundred feet in the direction from which a train is approaching, the railroad company does not owe him the duty of giving danger signals of the approach of its train. (pp. 768, 769.)

**NEGLIGENCE and Contributory Negligence.**—In an action based on negligence, if the evidence does not show any negligence on the part of the defendant, there can be no recovery, no matter how free from negligence the facts show the plaintiff to be. (pp. 769, 770.)

Q. A. Gordon and Templeton, Orr & Whiteman, for the appellant.

S. S. Mehard and W. J. Whieldon, for the appellee.

<sup>174</sup> **ELKIN, J.** The negligence complained of in the statement of claim is that the engine was "running at a very high rate of speed and making great and frightful noises," and that notice of the approach of the train to the crossing was not given "by the ringing of the engine bell or the blowing of the whistle." The testimony produced at the trial failed to show that the engine <sup>175</sup> was running at a high or unusual rate of speed, or that the train was making "great and frightful noises," nor were any facts proven that would warrant a submission of this question to the jury. This feature of the case was not pressed in the court below, and is not insisted on here. The testimony showed that the train was running at from fifteen to eighteen miles an hour, a very moderate rate of speed, so that we can safely dismiss this allegation from further consideration. The whole case of appellee is based on the allegation that no bell was rung nor was any whistle blown at a proper place before the train reached the crossing. Whether these signals were given

was a disputed question of fact at the trial, but it must be conceded, if it is held to have been the duty of the appellant to give them, there was sufficient testimony to submit to the jury in order to determine the fact. Was it the duty of the appellant to ring a bell or blow a whistle as the train approached the crossing? The rule is settled that such duty is imposed on railroad companies at grade crossings. Does the same rule apply to overhead crossings? If so, the judgment entered in the court below should be affirmed; if not, there can be no recovery under the facts of this case. The rule as applied to grade crossings was based upon a humane public policy intended as a protection to the lives, limbs and property of travelers, not only on the highways, but on the railroads as well. The dangers of crossing at grade were great, and the standard of care required to avoid these dangers was correspondingly great. In order to avoid, as far as possible, the dangers of collision in such cases, the courts have established the rule not to permit a grade crossing unless the physical conditions are such as to leave no alternative by the construction of an overhead or underground crossing. The railroad companies by the expenditure of vast sums of money are rapidly abolishing them, and in this laudable work should be encouraged. When, therefore, the risks and dangers of crossing at grade have been avoided by the construction of an overhead crossing, it would be unreasonable to make an imperative unbending rule requiring the performance of duties demanded as a protection where the danger is greater. In *Philadelphia etc. R. R. Co. v. Stinger*, 78 Pa. 219, it was held that failure to ring a bell or blow a whistle in approaching a grade crossing was negligence per se. This is the settled rule of our cases. In our opinion, however, no <sup>176</sup> such imperative duty is required at overhead crossings, because in such cases the dangers are not so great and the object of giving the signal is different. At a grade crossing, the object of requiring the signals to be given is to avoid a collision, while at an overhead crossing the only purpose to be served by blowing a whistle is to give notice to travelers on the highway so that they may keep out of the zone of danger. The learned counsel for appellee relies on *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. 259, 98 Am. Dec. 346, as ruling this question in his favor. It was

held in that case that wherever danger may result to persons rightfully traveling on a public road which crosses the tracks of a railroad, whether at grade, or over or under the same, it is the duty of the railroad company to give notice of the approach of its trains by proper signals. That case, however, must be understood in the light of its own facts. The cause of the accident there was not a failure to blow the whistle before reaching the crossing, but whistling as the train went under the bridge whilst a traveler was passing over it, by means of which, his horse was frightened, ran off, and injured him. The testimony showed that the accident was caused by blowing the whistle as the train passed under the bridge, and this was sufficient to submit to the jury to determine the question of the defendant's negligence without any reference to the allegation that the alarm signals were not given before the train reached the crossing. It is apparent that the question of the failure to give these signals in that case was introduced, not for the purpose of showing such negligence on the part of the defendant as would warrant a recovery, but to excuse the alleged contributory negligence of the plaintiff in not stopping his team before going over the bridge and waiting until the train had passed. On the east side of the public road, the direction from which the train was coming, there was a hill which obstructed the view for a distance of seventy-four rods from the railroad to within six rods of it, so that the traveler could not see the approaching train during all that distance, nor until within a few rods of the tracks. For this reason and under the circumstances of that case the trial judge charged the jury, in determining under all the facts whether the company was guilty of negligence, they should take into consideration the relative position of the public road and the railroad at or near the crossing; <sup>177</sup> the likelihood and facility of a traveler to discover an approaching train; and further taking into consideration the fact that trains approaching from the east would not be seen from a point at a safe distance from the bridge, whether it was the duty of the engineer to give notice of the approach of the train so as to put the traveler on his guard. Even in that case it seemed to be conceded that if the traveler could have seen the train at a safe distance from the crossing, there was no imperative

duty resting on the railroad company to give him notice. We doubt if that case would have been affirmed if the only negligence proven was the failure to give notice of the approach of the train, but this fact, under all the circumstances of that case, and the additional and material fact, the blowing of the whistle under the bridge while the horse was passing over it, were submitted to the jury to determine whether the defendant had been guilty of such negligence as to make it liable in damages. In the present case the same rule might be applicable, if in point of fact the horse had been frightened by blowing a whistle as the train passed over the crossing, but this important fact does not appear. Again, it must be observed that as Curry approached the crossing, driving his horse, he had a clear view of the railroad for a distance of nearly fifteen hundred feet in the direction from which the train was coming. He could see for himself whether a train was in view, and did not need to rely on danger signals to give him notice of that fact. It was as much his duty to keep a lookout for the train as it was for the appellant to give notice of its approach even at a grade crossing. At an overhead crossing the purpose of blowing a whistle is to give the traveler notice of the approach of the train, in order that he may avoid danger, but if he had within himself, by his own sense of sight, with an unobstructed view, the opportunity to observe, and failed to do so, appellant ought not to be convicted of negligence in failing to do for him what he failed to do for himself. It would be a strange rule to convict appellant of negligence for failure to give notice, and, at the same time, excuse the appellee from his duty to take notice, when both parties had equal opportunities for observing the situation and both were required to exercise reasonable care under the circumstances. The case was presented in the court below and has been argued here almost entirely on the question of contributory negligence. In <sup>178</sup> this connection it should be observed that the first and primary question to be considered in every such case is the negligence of the defendant. The contributory negligence of the plaintiff is predicated upon and presupposes the negligence of the defendant. If the testimony does not suppose negligence on the part of the defendant there can be no recovery, no matter how free from

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duty resting on the railroad company to give him notice. We doubt if that case would have been affirmed if the only negligence proven was the failure to give notice of the approach of the train, but this fact, under all the circumstances of that case, and the additional and material fact, the blowing of the whistle under the bridge while the horse was passing over it, were submitted to the jury to determine whether the defendant had been guilty of such negligence as to make it liable in damages. In the present case the same rule might be applicable, if in point of fact the horse had been frightened by blowing a whistle as the train passed over the crossing, but this important fact does not appear. Again, it must be observed that as Curry approached the crossing, driving his horse, he had a clear view of the railroad for a distance of nearly fifteen hundred feet in the direction from which the train was coming. He could see for himself whether a train was in view, and did not need to rely on danger signals to give him notice of that fact. It was as much his duty to keep a lookout for the train as it was for the appellant to give notice of its approach even at a grade crossing. At an overhead crossing the purpose of blowing a whistle is to give the traveler notice of the approach of the train, in order that he may avoid danger, but if he had within himself, by his own sense of sight, with an unobstructed view, the opportunity to observe, and failed to do so, appellant ought not to be convicted of negligence in failing to do for him what he failed to do for himself. It would be a strange rule to convict appellant of negligence for failure to give notice, and, at the same time, excuse the appellee from his duty to take notice, when both parties had equal opportunities for observing the situation and both were required to exercise reasonable care under the circumstances. The case was presented in the court below and has been argued here almost entirely on the question of contributory negligence. In <sup>178</sup> this connection it should be observed that the first and primary question to be considered in every such case is the negligence of the defendant. The contributory negligence of the plaintiff is predicated upon and presupposes the negligence of the defendant. If the testimony does not suppose negligence on the part of the defendant there can be no recovery, no matter how free from

Philadelphia etc. R. Co., 213 Pa. 157, 62 Atl. 643, 4 L. R. A., N. S., 344. In the present case, the facts proven at the (N. S.) 344. In the present case, the facts proven at the trial did not show any such negligence as would make the appellant liable in damages for the injuries sustained, and it is the duty of the court to say there can be no recovery.

Judgment of the court below reversed, and is here entered for appellant.

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*A Railroad Company is Bound to take such reasonable precautions for the safety of travelers at public crossings as the occasion may demand. This duty of course varies according to the character of the crossing. At ordinary crossings the duty is imperative to give signals and warnings of the approach of trains, and this duty is not necessarily discharged merely by giving the signals required by statute: Kinyon v. Chicago etc. Ry. Co., 118 Iowa, 349, 96 Am. St. Rep. 382, and cases cited in the cross-reference note thereto. Perhaps the law imposes no absolute duty upon a railway company to warn travelers of the approach of a train at a place where its road crosses a highway on an overhead bridge. If the place is dangerous, the company must give such warning to travelers in the highway; but whether, as a matter of fact, the place is dangerous, is a question for the jury: Louisville etc. R. R. Co. v. Sawyer, 114 Tenn. 84, 108 Am. St. Rep. 881. See Favor v. Boston etc. R. R. Co., 114 Mass. 350, 19 Am. Rep. 364; Pennsylvania R. R. Co. v. Barnett, 59 Pa. 259, 98 Am. Dec. 346.*

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## BARTO v. BEAVER VALLEY TRACTION COMPANY.

[216 Pa. 328, 25 Atl. 792.]

**STREET RAILWAYS—Right to Use Track—Contributory Negligence.**—The track of a street railway is open for use by those riding in vehicles, as the space between the rails is paved for that purpose, and their right to use this part of the track is subordinate only to the right of the railway company to have a clear track. Those in vehicles are expected to use such track both from necessity at times, and for convenience when it offers the better passageway, and one using it for convenience cannot be charged with negligence simply because he could have driven at the sides of the street. Under such circumstances, the question whether he exercised proper care or not is for the jury to determine. (p. 771.)

A. P. Marshall, for the appellants.

J. L. Hogan and J. M. Buchanan, for the appellee.

<sup>330</sup> FELL, J. The defendant has a single track electric railway on one of the streets of the borough of Monaca, on

which one car is run every fifteen minutes. The track is at the middle of the street, and there is room on either side for vehicles. The space between the rails is paved; the rest of the street is an ordinary dirt road. The plaintiffs that night were driving in a buggy at a slow trot on the track. The top of the buggy was down and they had looked back several times to see whether a car was coming. They first observed the car when it was a rod from them, and the buggy was struck before they succeeded in getting it clear of the track. The car was running fifteen miles an hour, without a headlight, and no signal of its approach was given. Under this state of facts detailed by the plaintiffs and other witnesses, a verdict was directed for the defendant on the ground of the plaintiffs' contributory negligence in driving on the track at night, when there was room to drive on other parts of the street.

The conclusion reached by the learned trial judge was based on the decisions of this court in *Gilmartin v. Lackawanna Val. Rapid Transit Co.*, 186 Pa. 193, 40 Atl. 322, and *Penman v. McKeesport etc. R. Co.*, 201 Pa. 247, 50 Atl. 973. In both of those cases the plaintiffs were pedestrians, and the ground of both decisions is that by walking along on the track of the railway company, they voluntarily exposed themselves to a known danger and were negligent in so doing. The track of a street railway company is not intended for use by pedestrians, but it is open for use by those riding in vehicles. The space between the rails in cities and boroughs is paved for that purpose, and the traveling public are at liberty to drive on it. Their right to use this part of the street is subordinate only to the right of the company to have a clear track. They are expected to use it both from necessity at times and for convenience when it offers a better passageway. One using it for convenience, as was the case here, cannot be charged with negligence simply because of the fact that he could have driven at the sides of the street. Whether, under the circumstances, the plaintiffs exercised proper care was for the jury.

The judgment is reversed, with a venire facias de novo.

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*The Right of a Railway Company in a Street* is only an easement to use the highway in common with the public. It has no exclusive right of travel upon its track, although it has the superior right there, and it must exercise its right with due regard to the rights

of travelers thereon: *Rascher v. East Detroit Ry. Co.*, 90 Mich. 413, 30 Am. St. Rep. 447; *Thatcher v. Central Traction Co.*, 166 Pa. 66, 45 Am. St. Rep. 645. A person has the lawful right to drive his carriage on the tracks of a street-car company, if he exercises due care to avoid an undue interference with its rights and to avoid a collision: *North Chicago St. R. R. Co. v. Zeiger*, 182 Ill. 9, 74 Am. St. Rep. 157.

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### RONEY v. WESTLAKE.

[216 Pa. 374, 65 Atl. 807.]

**JUDGMENTS—Res Judicata.**—A judgment in favor of the maker of a note in an action thereon, on the ground that it was not stamped with the proper internal revenue stamp, is *res judicata* as to a subsequent action between the same parties on the same note after the proper internal revenue stamp has been affixed thereon. (p. 773.)

R. W. Irwin and J. M. Dickson, for the appellant.

R. H. Meloy and C. L. V. Acheson, for the appellee.

<sup>375</sup> **MESTREZAT, J.** On April 15, 1905, John L. Roney, the plaintiff in the present suit, brought an action of assumpsit at No. 177, May term, 1905, of the common pleas of Washington county, against Jane R. Herron, the present defendant's testatrix, to recover on a promissory note, of which the following is a copy:

"\$3,000.

August 18, 1899.

"One day after date I promise to pay to the order of John L. Roney three thousand dollars without defalcation for value received.

"[Seal]

JANE R. HERRON.

"Witness:

"[Seal] JOHN ANDERSON."

The defendant appeared and pleaded nonassumpsit. The <sup>376</sup> case was tried before a jury, and a verdict was rendered for the defendant. A motion for a new trial was heard and overruled, and, on January 20, 1906, judgment was entered on the verdict.

On February 8, 1906, John L. Roney brought the present action of assumpsit in the common pleas of Washington county against John S. Westlake, executor of Jane R. Her-

ron, deceased, and the statement claimed to recover the debt and interest due on the note on which the former action was brought. The defendant pleaded nonassumpsit, payment, setoff, statute of limitations, and "that all matters set forth in the plaintiff's statement had been adjudicated as will appear by the record at No. 177, May term, 1905, of this court." On the trial of the cause, the defendant put this record in evidence to sustain his plea of *res adjudicata*. The court directed a verdict for the plaintiff on the evidence submitted, and reserved the question whether the plaintiff's claim had been adjudicated in the former action. Subsequently, in an elaborate and satisfactory opinion, the court entered judgment for the defendant on the question reserved. The plaintiff has appealed.

An examination of the record of the first case shows that on the trial the plaintiff proved the execution of the note by the attesting witness. The note was then offered in evidence and, upon objection by defendant's counsel, was excluded, on the ground that it was not stamped as required by the war revenue act of Congress. The plaintiff offering no additional testimony, the jury, under the instructions of the court, rendered a verdict for the defendant on which judgment was subsequently entered.

A month prior to bringing the present suit, the plaintiff had the collector of customs place the proper revenue stamp on the note. On the trial of this cause, the plaintiff, having proved the maker's signature, put the note in evidence and rested. The defendant then put in evidence the record of the former action, and the case was closed. Subsequently, judgment non obstante veredicto was entered for the defendant. The only question on this appeal is whether this record is, as held by the court below, a bar to the present suit. It is difficult to see how this question can be answered in the negative.

<sup>377</sup> In the two actions there is identity of the note sued on, of the cause of action, and of the parties, and both actions were heard and determined by the same court which was of competent jurisdiction. The issue in both actions was the same. At the time of bringing the first suit, the note was due, and, if genuine and not paid, the plaintiff had the right to recover, but the pleadings required him to sustain his ac-

tion by competent evidence. He proceeded on the trial to meet this requirement in the case. He proved the maker's signature by the attesting witness, sufficiently so at least to admit the note in evidence, if there was no other legal ground for excluding it. The next step in the progress of the trial, and one absolutely necessary to be taken to entitle him to recover, was to put the note in evidence. He offered the note, but it was excluded by the court on the ground that no United States revenue stamp had been placed upon it. So far as the evidence in the case discloses, the note was genuine and unpaid, and the only reason urged or assigned for excluding it was the failure to stamp it. Of course, the note upon which the suit was brought not being in evidence, the court was compelled by the insufficiency of the testimony submitted by the plaintiff to direct a verdict for the defendant. The judgment entered upon the verdict was not appealed from nor reversed, and is therefore conclusive upon the parties as to the issue therein adjudicated.

There is and can be no doubt as to the issue raised by the pleadings, and determined by the trial and judgment in the first action, and that is, whether Jane R. Herron signed, sealed and delivered to the plaintiff the note, and whether she or her estate still owed the claim at the time the suit was brought. The record conclusively shows this to have been the issue tried and determined in the first suit. The issue was tried before the court and a jury in the usual, ordinary way in such cases, and the trial resulted in a verdict in favor of defendant, not on a technicality, but on the merits of the case, and because the evidence of the plaintiff was not sufficient to sustain the issue directly raised by the pleadings. The plaintiff was required to support the issue formed by the pleadings by sufficient evidence, and if he withheld the evidence, or any part of it, and the verdict and judgment for that reason went against him, he <sup>378</sup> is concluded. This is equally true if the verdict was adverse to him because the court, though erroneously, excluded evidence which, if admitted, would have produced a different result. In 1 Freeman on Judgments, section 272, the learned author discusses the question of a judgment as an estoppel in a subsequent action, and, citing numerous American and English authorities to support the text, says: "That he [the plain-

tiff] will not be allowed to bring another action, because in the first he gave no evidence of his demand; that he will not be permitted to reserve, or from any cause not to produce, part of his evidence; and that the judgment will be conclusive as to every matter which he could have proved in the first suit, and which was not proved nor withdrawn. . . . If the claim is specifically embraced in the pleadings, the presumption is, that it was presented at the trial, and considered in the rendition of the judgment. If a court erroneously rejects evidence, offered to prove a claim or defense, on the ground that it is inadmissible, such claim, nevertheless, on rendition of the judgment, becomes *res judicata*, and so remains until the judgment is vacated or reversed by some appropriate proceeding. . . . A judgment of a court possessing competent jurisdiction is final, not only in reference to the matters actually or formally litigated, but as to all other matters which the parties might have litigated and had decided in the cause. A party cannot try his action in parts. The judgment is conclusive, not only of the matters contested, but as to every other thing within the knowledge of the complainant which might have been set up as a ground for relief in the first suit."

In the present suit, the record discloses that it is between the same parties and was brought on the same note or for the same cause of action as the former suit. It is obvious that it would require the same evidence to sustain both actions, which, it is said in numerous cases and approved by Judge Freeman in his work on Judgments, is the test as to whether a judgment is a bar to a subsequent action: 1 Freeman on Judgments, sec. 259, and cases cited in note, including *Marsh v. Pier*, 4 Rawle, 273. It is contended, however, and it is the ground on which the plaintiff seeks a reversal on this appeal, that the former judgment was not upon the merits of the case, but because "the plaintiff could not call upon the estate of Jane R. Herron to <sup>379</sup> pay the note until he had it properly stamped." In other words, the plaintiff contends that the only question decided in the prior action was "whether or not the plaintiff could collect the amount of that note from the estate of Jane R. Herron without having the proper revenue stamps upon the note." This view fails to discriminate between a ruling by the court

on the competency of testimony offered to prove an issue, and a decision of the issue itself raised by the pleadings and to be decided by the court and jury. The ruling by the court on the competency of the note as evidence is entirely different from a decision of the issue, which was whether the note was executed by the defendant and whether she still owed the money. Competent evidence was required to establish the plaintiff's claim on the note, and if the evidence offered was inadmissible for any reason and the verdict and judgment were for the defendant, the question decided and which becomes *res judicata* is, not the court's ruling on the evidence, but whether Jane R. Herron executed the note and she or her estate owes the plaintiff the amount of it. Assume that instead of the note having been excluded because of the absence of a stamp, the plaintiff had failed to prove the maker's signature, the court would have been compelled to reject the note as evidence. Or suppose the note when offered was mutilated to such an extent as to render it incompetent and the court had excluded it. In these and similar cases, it will not be pretended that a verdict and judgment for the defendant because of the exclusion of the note would not be *res judicata* as to the right of the plaintiff to maintain a second action on the note. These cases are not distinguishable in principle from the case at bar. In all such cases, the note is disqualified as evidence, and being material and absolutely necessary to sustain the issue on the part of the plaintiff, his right to recover on the note, the matter in issue, is resolved against him and the adjudication is final. If, in the instances suggested, or if, as here, the note is not stamped and the defendant objects to its competency as evidence, and it is excluded, the plaintiff can readily protect himself by taking a nonsuit which leaves the merits of the case undetermined, and gives him an opportunity to secure proper testimony and have the case adjudicated on its merits. If, however, as in this case, the plaintiff, under such circumstances, permits a verdict and <sup>380</sup> judgment to go against him, the finality of the judgment will not be destroyed or affected because the verdict was the result of the failure of the plaintiff to sustain his claim by competent evidence.

We are of opinion that the trial and judgment in the former case conclude the plaintiff as to the liability of Jane



R. Herron or her estate on the note in suit, and is a complete bar to any subsequent suit involving the same issue and for the same cause of action.

The case in hand must be distinguished from that class of cases where the judgment set up in bar of the second action is not upon the merits of the question involved in litigation. Those cases are where the judgment is founded upon a lack of jurisdiction, a nonjoinder or misjoinder of parties, plaintiff or defendant, a misconception of the form of pleading, a formal or technical defect in the pleadings, or the like: 24 Am. & Eng. Ency. of Law, 2d ed., 794; or where the suit is discontinued, the plaintiff becomes nonsuit, the debt is not yet due, or there is a temporary disability of the plaintiff to sue: 1 Greenleaf on Evidence, secs. 529, 530; Weigley v. Coffman, 144 Pa. 489, 27 Am. St. Rep. 667, 22 Atl. 919. Judgments in those cases are not obtained upon the merits, and hence are not a bar to another action. But here, no reasons of this character existed in the first action to prevent a trial and determination of the cause upon the merits, and therefore the judgment is conclusive on the parties as to the right of the plaintiff to recover on the note.

The assignments of error are overruled and the judgment is affirmed.

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*The Rules of Res Judicata* are stated in the recent cases of Brack v. Boyd, 211 Ill. 290, 103 Am. St. Rep. 200; Rew v. Independent School Dist., 125 Iowa, 28, 106 Am. St. Rep. 282; Pietsch v. Milbrath, 123 Wis. 647, 107 Am. St. Rep. 1017; Pakas v. Hollingshead, 184 N. Y. 211, 112 Am. St. Rep. 601; Pereles v. Gross, 126 Wis. 122, 110 Am. St. Rep. 901; Davis v. Schmidt, 126 Wis. 461, 110 Am. St. Rep. 938.

**MAIORANO v. BALTIMORE AND OHIO RAILROAD COMPANY.**

[216 Pa. 402, 65 Atl. 1077.]

**TREATIES—Construction.**—If treaty rights are conferred of a nature to be enforced in a court of justice, the court resorts to the treaty for the rule of decision as it would to a legislative enactment. (p. 779.)

**TREATIES—Construction.**—In construing a treaty the general rule obtains that the court is to be guided by the intention of the parties, and if the words clearly express the meaning and intention, no other means of interpretation can be employed. (p. 779.)

**TREATIES—Rights Under—Who Entitled to.**—The provision in the treaty between the United States and Italy stipulating that citizens of that country while in the United States shall enjoy, in the protection and security of their persons and property, the same rights which the citizens of the United States enjoy, applies only to such citizens of Italy with respect to their persons or property as are within the jurisdiction of the United States. (p. 779.)

**TREATIES—Rights of Nonresident Aliens Under.**—Under treaty provisions between the United States and Italy stipulating that citizens of the latter country while in the United States shall enjoy, in the protection and security of their persons and property, the same rights which the citizens of the United States enjoy, a nonresident alien who is a citizen of Italy cannot maintain an action in the United States for recovery of damages for injury causing the death of another citizen of Italy while in the United States. (p. 781.)

G. C. Bradshaw, T. Thompson and W. H. S. Thompson, for the appellant.

J. S. Wendt and J. McCleave, for the appellee.

**405 STEWART, J.** A single fact not appearing, and of course, not considered, in the case of *Deni v. Pennsylvania R. R. Co.*, 181 Pa. 525, is relied upon to distinguish this case from that, and exempt it from the operation of the rule there declared. That case expressly decides that a nonresident alien has no standing to maintain an action under the act of April 26, 1855 (Pub. Laws, 309), for the recovery of damages for injury to another causing death. There, as here, the party claiming the right of action was a nonresident alien, the citizenship in both cases being in the kingdom of Italy. The fact not disclosed in that case and appearing in this is, the existence of a treaty between the United States and the kingdom of Italy, whereby certain reciprocal rights in the citizens of the several countries are agreed upon and

established. <sup>406</sup> Article 3 of this treaty provides as follows: "The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives on their submitting to the conditions imposed upon the natives." It is unnecessary for present purposes to recite other parts of the treaty, since whatever appears elsewhere upon this particular question is mere matter of detail or amplification. If the plaintiff has the right here contended for, it must be derived from the article above recited.

By the express constitutional provision a treaty entered into between the United States and any foreign power is supreme law. The constitution further declares with respect to it, "The judges in every state shall be bound thereby, anything in the constitution of any state to the contrary notwithstanding." When by such treaty rights are conferred of a nature to be enforced in a court of justice, the court resorts to the treaty for the rule of decision as it would to a legislative enactment: *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. Rep. 247, 28 L. ed. 798. It is frequently necessary in cases of this kind for courts to ascertain by construction the meaning intended to be conveyed by the terms used, and the application of the stipulations of the treaty to particular cases: *United States v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425; *Scharpf v. Schmidt*, 172 Ill. 255, 50 N. E. 182. In construing a treaty the general rule obtains that the court is to be guided by the intention of the parties, and if the words clearly express the meaning and intention, no other means of interpretation can be employed: *Ware v. Hylton*, 3 U. S. 199, 1 L. ed. 568.

These principles are to be observed in determining the question before us—Does the stipulation on the part of the United States, that the citizens of Italy in our states and territories shall enjoy, in the protection and security of their persons and property, the same rights which our own citizens enjoy, confer upon the plaintiff the right to recover in an action at law under the provisions of the statute of April 26, 1855, for the death of her husband? While the treaty stipulates for reciprocal rights, we may, for convenience here, consider it as a covenant engagement by the

United States alone. The rights <sup>407</sup> granted have regard solely to the protection and security of persons and property, and are such as our own citizens enjoy in connection therewith. These rights are ordinarily incident to, but do not constitute, citizenship. While the treaty by its terms includes the entire citizenship of Italy, it is obvious that its provisions can avail those only who, either with respect to their persons or property, are within the jurisdiction of the United States. With respect to the particular rights conferred, the treaty places those citizens of Italy who bring their persons or property within the covenant relation upon an exact equality with our own citizens for the time being. Upon withdrawal of persons or property from the jurisdiction of the United States the rights cease, for in that case they have nothing to operate upon. The plaintiff is a resident of Italy, and, so far as appears, has never been within the limits of the United States, nor has she at any time had property subject to its laws. Her husband, for whose death she claims to recover, was not a citizen of the United States, but had brought himself into the covenant relation with the United States by coming here. While here he met his death in a collision on the defendant's railroad. There can be no question as to the extent of his rights. Had he survived the accident, he could have maintained an action against the railroad company for the recovery of compensatory damages. His subsequent death would not have abated the action; it would have survived to his personal representatives to the use of the beneficiaries indicated in the act. The foundation for such an action would be the injury and loss the party himself had suffered, and the action would be in his own right. This is the full measure of the right which under similar circumstances would belong to one of our own citizens. At common law the death of a human being could not be complained of as an injury in a civil court, and, therefore, could not be made the ground of an action for damages. While the statute allows such action at the suit of husband, widow, children or parents, the action is not for the enforcement of any right which was in the party killed, but for a wholly distinct cause not affecting in any way the estate or rights of such party; it is exclusively for such damages as the parties plaintiff in the action have sustained by reason of the death. As <sup>408</sup> was

said in *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. 318, this latter is a new and independent right given by positive law—not cast upon the parties to whom the statute gives it by survivorship as for injury done the decedent, but is for the wrong done to them as individuals. The measure of damages allowed in such cases is but another expression of the same truth; the damages are limited to the pecuniary value of the life lost to those who sue, indicating clearly that the right to sue is not as though it came by succession as the right to recover what belonged to the party killed, but an independent cause of action for damages sustained by those who are allowed to bring the action.

What we have said sufficiently indicates the difference between the rights of the plaintiff and those of her husband, and the ground upon which the distinction is based. The injury for which the plaintiff sues is her own peculiar injury resulting from the death of her husband, and not for injuries he received. A statute right is given our citizens in such case, but plaintiff, as we have seen, with respect to any such claim is not within any treaty privileges, but is simply an alien. This being the case the doctrine of *Deni v. Pennsylvania R. R. Co.*, 181 Pa. 525, 59 Am. St. Rep. 676, 37 Atl. 558, applies, and it results that the nonsuit was properly ordered.

The judgment is affirmed.

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*If a Treaty* admits of two constructions, one restrictive of the rights that may be claimed under it and the other liberal, the latter prevails: *Schultze v. Schultze*, 144 Ill. 290, 36 Am. St. Rep. 432.

*The Benefits of a Statute Giving a Right of Action* for wrongful death may, according to the better opinion, be claimed in behalf of nonresident alien relatives of a person negligently killed in the state: *Alfson v. Bush*, 182 N. Y. 393, 108 Am. St. Rep. 815, and cases cited in the cross-reference note thereto; *Pittsburgh etc. Ry. Co. v. Naylor*, 73 Ohio St. 115, 112 Am. St. Rep. 701.

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**McALEER v. GOOD.**

[216 Pa. 473, 65 Atl. 924.]

**ARREST.**—To Constitute an Arrest it is not necessary that there be an application of actual force, or manual touching of the body, or such physical restraint as to be visible to the eye. (pp. 782, 783.)

**FALSE IMPRISONMENT—Unlawful Arrest.**—If policemen go to a man's house and in some manner succeed in getting him to accompany them to the office of the chief of police, who searches him and then has him incarcerated in prison, such officers may be held liable for an unlawful arrest and false imprisonment if such arrest is made without cause. (p. 783.)

**FALSE IMPRISONMENT—Unlawful Arrest.**—If an arrest of one person without cause is made at the instance of another with his knowledge and consent, he is liable for the unlawful arrest and false imprisonment, although he may not have expressly directed the officer to make the arrest. (p. 783.)

**FALSE IMPRISONMENT—Burden of Proof.**—In an action for unlawful arrest and false imprisonment the burden of proof is upon the defendant to show that the arrest was made by authority of law. (p. 783.)

**FALSE IMPRISONMENT—Unlawful Arrest—Defenses.**—Constables and other officers who arrest persons suspected of having committed felony, in actions for damages therefor, should be allowed to defend upon like principles as a private person who causes an arrest by a complaint on oath. (p. 783.)

**FALSE IMPRISONMENT—Unlawful Arrest—Damages.**—If an officer wantonly and maliciously arrests an innocent man he is liable in as heavy punitive damages as a private person would be for a causeless and malicious prosecution; but if without notice, and in the honest endeavor to arrest and bring a felon to justice, he takes an innocent person who is justly suspected, he is not liable at all. (pp. 783, 784.)

C. F. McGirr and J. Marron, for the appellant.

**475 ELKIN, J.** This is an action for unlawful arrest and false imprisonment. The learned trial judge, after hearing the plaintiff's evidence, directed a compulsory nonsuit to be entered with leave to move the court in bank to take it off. A motion to take it off was accordingly made and refused. The ruling is based on the ground that the testimony produced by the plaintiff failed to establish a joint act by the three defendants and did not show that Lamp and Moore had anything to do with the arrest and imprisonment of McAleer. We do not so read the testimony. This being a judgment of nonsuit, the evidence produced by the plaintiff must be accepted as true. It will not be seriously contended

that to constitute an arrest, there must be an application of actual force, or manual touching of the body, or such physical restraint as to be visible to the eye. Such is not the law. All the authorities agree an arrest may be made either with or without a manual or actual touching by the officer. However, the manner of making the arrest would seem to be unimportant in view of the fact that Lamp and Moore went to the house of McAleer and in some manner succeeded in getting him to accompany them to the office of the chief of police, who searched him and afterward had him incarcerated in prison from about noon of the day of the arrest until 4 P. M. the next day. These facts indicate that the defendants were acting parts in the machinery set in motion by the chief of police, which resulted in the imprisonment complained of. As to Good, it need only be said that if the arrest was made at his instance, with his knowledge and consent, it is sufficient to make him liable as a party, although <sup>476</sup> he may not have expressly directed the officer to make the arrest: *Burke v. Howley*, 179 Pa. 539, 67 Am. St. Rep. 607, 36 Atl. 327.

Again, it must not be overlooked that in an action for unlawful arrest, and false imprisonment, the burden is upon the defendants to show that it was by authority of law: *McCarthy v. DeArmit*, 99 Pa. 63. In this respect, the rule as to the burden of proof is not analogous to an action for malicious prosecution wherein it has been held to be the duty of plaintiff to affirmatively show want of probable cause.

In the case at bar the testimony was sufficient, if believed, to cast on the defendants the burden of showing probable cause for the arrest and imprisonment. The rule applicable to such cases is very well stated in *McCarthy v. De Armit*, 99 Pa. 63, wherein Mr. Justice Trunkey, who delivered the opinion of the court, said: "Constables and other police officers, who arrest persons suspected of having committed felony, in actions for damages, should be allowed to defend upon like principles as a private person, who causes an arrest by a complaint on oath; for it is the duty of those officers to make such arrests. If an officer wantonly and maliciously arrests an innocent man, he ought to be liable in quite as heavy punitive damages as a private person would be for a causeless and malicious prosecution; but if without notice, and in the honest endeavor to arrest and bring a felon to justice, he

takes an innocent person, who was justly suspected, he should not suffer at all."

These are matters to be determined at the trial of the case. Judgment reversed and a procedendo awarded.

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*The Malicious Prosecution* of civil actions is the subject of a note to *McCormick Harvesting etc. Co. v. Willan*, 93 Am. St. Rep. 454; and the malicious prosecutions of criminal actions is the subject of a note to *Ross v. Hixon*, 26 Am. St. Rep. 127.

*Any Person Who Aids or Abets an Unlawful Arrest* is liable for false imprisonment. And every restraint upon a man's liberty is, in the eyes of the law, an imprisonment, which, if not lawful, is a false imprisonment: *Goodell v. Tower*, 77 Vt. 61, 107 Am. St. Rep. 745.

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## KLEIN v. PENNSYLVANIA SAVINGS FUND AND LOAN ASSOCIATION.

[216 Pa. 516, 65 Atl. 1103.]

**BUILDING AND LOAN ASSOCIATIONS—Usury.**—If the members of a building and loan association are notified by its officers that they will be required to pay six per cent per annum premium on all loans in addition to legal interest, and they accordingly make written application for loans on such terms, giving a power of attorney to an officer of the association to submit their bid, and the board of directors of such association pass upon such applications, according to their priority without any bidding or competition, they act in violation of law, and a member is entitled to set off against the principal of his loan all premiums paid in excess of legal interest. (pp. 788, 789.)

Bill for an accounting. In the trial court an opinion was filed, which, in part, is as follows:

516 "FRAZER, P. J. The purpose of the bill in this case was to secure permission for plaintiff to pay into court a balance claimed to be due by defendant from plaintiff on a mortgage against certain property owned by plaintiff: also, to have the mortgage satisfied and allow plaintiff to contest defendant's right to the balance claimed by it. From the bill, answer and proofs we find the following facts:

### "FINDINGS OF FACT.

"1. Defendant is a corporation of the state of Pennsylvania, organized in the year 1891, under the building and loan association act, approved April 29, 1874 (Pub. Laws. 73), its principal office being located in the city of Pittsburgh.



"2. Plaintiff, as a member of defendant corporation, subscribed for forty shares of its capital stock and borrowed thereon the sum of \$4,000. [At the time of making his application <sup>517</sup> for the loan he was informed at the office of defendant by a person in the office at the time that a premium of six per cent on his loan would be necessary, and that thereupon he signed a written application for the loan], [1] together with a power of attorney authorizing W. A. Hemphill, an employ  of the association, to represent him at a meeting of defendant company to be held July 12, 1894, and bid for him a premium of six per cent per annum for preference or priority of loan. The paper signed by plaintiff is as follows:

" 'I Robt. Klein, of Pittsburgh, County of Allegheny, State of Penna., being a member of the Pennsylvania Savings Fund & Loan Association, and desiring to borrow therefrom the sum of \$4,200, do hereby appoint W. A. Hemphill of Pittsburgh, to attend a meeting of the members of said association and there to bid for me and in my name and place a premium of six per cent per annum for preference or priority of loan, to be paid by me in monthly installments in addition to the interest of six per cent on the sum borrowed.

" 'Witness, my hand this 10th day of July, A. D. 1894.

" '(Signed) ROBERT KLEIN.'

" 'I, W. A. Hemphill, being personally present at a meeting of the members of the Pennsylvania Savings Fund & Loan Association held this 12th day of July, 1894, at the principal office of said association, Pittsburgh, Pa., by virtue of the foregoing appointment, have at the said meeting, for and in the name of the said Robert Klein, bid six per cent premium for priority of loan.

" '(Signed) W. A. HEMPHILL.

" 'Attest:

" 'HARVEY HENDERSON.'

"3. At the meeting at which plaintiff's loan was granted there were altogether fifteen applications for loans, each applicant being represented either by Mr. Hemphill, who represented Klein, or by Mr. Black, the general manager of

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the defendant association, under powers of attorney similar to that signed by plaintiff. [The applications and bids were handed in one at a time by the person representing the applicant, and thereafter were taken up by the board and passed upon in the order of priority of date. There was no bidding or competition whatever <sup>518</sup> between the persons representing those members desiring to become borrowers.] [2]

"4. [Previous to the month of February, 1894, under the by-laws of defendant association, then in force, borrowers were required to pay a fixed premium of fifty cents per share, which amounted to six per cent per annum.] [3] In February, 1894, however, the by-laws were amended by striking therefrom the requirement for a fixed premium. At the time plaintiff procured his loan each applicant bid a premium of six per cent per annum, there being no bids for either a greater or less amount. Subsequently loans were made for a time at a premium of 4.8 per cent per annum, and afterward at three per cent per annum. While no action by the board of directors; or the stockholders of the association, was taken requiring borrowers to pay a fixed premium, it, however, appears from the testimony to be a fact that no loans were made without the payment of a six per cent premium during a certain period, and 4.8 per cent premium during a subsequent period, and a three per cent premium during a still later period.

"5. Borrowers were seldom present at meetings at which their applications for loans were passed upon, it being [the universal custom to have the application presented by a representative of the borrower, who usually was either an officer or employé of the association, the application and authority to the representative to bid in all cases being similar to that signed by plaintiff.] [4]

"6. On July 21, 1902, plaintiff made application in writing to defendant association requesting that the premium of six per cent per annum for priority of loan be reduced to one per cent per annum, and interest to five per cent per annum. which request was granted by the board of directors on that day, and that thereafter plaintiff was charged with interest and premium at this reduced rate.

"7. Upon his loan plaintiff has made the following payments to defendant association, viz.:

" 96 monthly installments of premium at \$20...	\$1,920
"103 monthly installments of interest at \$20.....	2,060
"105 monthly installments of dues at \$20.....	2,100
	<hr/>
"Total.....	\$6,080

519 "Plaintiff's claim is that the above payments are ample to fully discharge his indebtedness to defendant on account of his loan.

"8. Defendant claims the sum of \$1,601.78 to be still due it on account of plaintiff's indebtedness.

### "CONCLUSIONS OF LAW.

"2. [In this case defendant is a building and loan association and plaintiff a stockholder thereof. Was the law complied with in bidding for preference. At the time plaintiff received his loan there were fifteen applications for loans. It does not appear that a single applicant was present in person at the meeting. Each had signed an application prepared by the association and had appointed an officer of the association his representative to bid for him a definitely fixed premium of six per cent per annum. These applications were virtually an agreement upon the part of the borrower to pay a premium of six per cent in addition to legal interest, and the power of attorney attached merely authorized the applicant's representative to convey that offer to the association. It does not appear to have been the intention of the parties that there should be competition between the borrowers. On the contrary, the conclusion is irresistible that just the opposite was intended. Instead of bidding, i. e., competing at auction for priority, these offers were handed to the directors of the association by the representative of the applicant, and were thereafter acted upon according to priority of date. In construing the statute permitting premiums on loans our appellate courts have in no uncertain language laid down the course to be pursued to make such charges valid.] [5]

"3. [In this case we have found as a fact that at the time plaintiff received his loan there was no competitive bidding. That finding, it seems to us, is clearly warranted by the evidence and the surrounding circumstances. Plaintiff testifies,

and the testimony of at least one other witness tends to support him, that he was informed by an employé of the association that a six per cent premium would be necessary to secure a loan, and it also appears that at the time plaintiff received his loan, and for some time both before and after, no loans were <sup>520</sup> made by defendant association to borrowers for either a greater or less premium than six per cent. These circumstances, together with the fact that every applicant for a loan at the meeting of July 12, 1894, received a loan at the uniform premium of six per cent and also that the applications were acted upon by the directors in the order of their date, show conclusively that the money for loan was not offered in open meeting and awarded to the highest bidder for priority, as the law directs. It therefore follows that the premium charged plaintiff previous to July 21, 1902, the time at which the premium and interest were reduced, is usurious and illegal.] [6]

"[4. Plaintiff having paid defendant association as dues, interest and premiums the sum of \$6,080, which amount is more than sufficient to fully pay and cancel his loan of \$4,000, together with legal interest thereon, it follows that he is not indebted to defendant in the sum of \$1,601.78 or any other amount, and that the money in court, less prothonotary's commissions, should be paid to him.] [7]"

"A decree was entered in accordance with the opinion."

W. B. Rogers, for the appellant.

W. H. Lemon, for the appellee.

MESTREZAT, J. The single question raised by this appeal is whether Klein obtained his loan from the defendant association by competitive bidding. The learned trial judge has found that at the time Klein's loan was granted there were fifteen applications for loans, that the application and bids were handed in one at a time by the person representing the applicant and thereafter <sup>521</sup> were taken up by the board and were passed upon in order of priority of date, that there was no bidding or competition whatever between the persons representing those members desiring to become borrowers.

On these findings of fact, the court's conclusion of law is as follows: "Was the law complied with in bidding for

preference? At the time plaintiff received his loan there were fifteen applications for loans. It does not appear that a single applicant was present in person at the meeting. Each had signed an application prepared by the association and had appointed an officer of the association his representative to bid for him a definitely fixed premium of six per cent per annum. These applications were virtually an agreement upon the part of the borrower to pay a premium of six per cent in addition to legal interest, and the power of attorney attached merely authorized the applicant's representative to convey that offer to the association. It does not appear to have been the intention of the parties that there should be competition between the borrowers. On the contrary, the conclusion is irresistible that just the opposite was intended. Instead of bidding, i. e., competing at auction for priority, these offers were handed to the directors of the association by the representative of the applicant, and were thereafter acted upon according to priority of date."

These conclusions of fact and law are amply justified by the testimony and the authorities cited in the opinion of the court. The finding that plaintiff was told that he must bid six per cent premium is sustained by the testimony, and we think the testimony also shows that his information came from some person authorized to speak for the company. Kleeb, a bookkeeper of the association during part of the time the plaintiff was a stockholder, testified that during the four years he was in the service of the association—up to 1903—the borrower was told the amount of premium he had to pay. This is supplemented by the testimony of the plaintiff that he was told in the office of the association that his loan would cost him six per cent interest and in six per cent premium, and by the further fact that the fifteen applicants for loans all bid the same amount of premium, six per cent, at the meeting at which the loans were granted.

<sup>522</sup> As tending to show that, at the time the plaintiff secured his loan, the association had adopted a fixed premium and disregarded the statutory requirement that money should be loaned to the highest competitive bidder, it was competent for him to introduce evidence to show that immediately prior to granting his loan the association had a fixed premium, that it was in effect at the time his loan was

granted and was continued thereafter, and that it was the universal custom of the association to have the application for a loan presented by a representative of the borrower who usually was either an officer or employé of the association. Such testimony tended to establish not only the fact that the association had a fixed, definite premium for all loans, but that, as the plaintiff alleges, his loan and the loans of the other stockholders whose applications were considered at the same time were granted for a premium previously fixed by the association.

At the meeting at which the plaintiff was granted his loan there was no bidding at auction, nor crying bids, nor but a single bid for any loan secured. Each applicant for a loan offered a certain premium which he had been informed was necessary to obtain a loan, and without any other bid, greater or lesser, he obtained the loan. Such action on the part of the defendant association clearly shows that it was not conducting a legitimate building and loan association business, but was using its charter as a device or cover for the purpose of evading the usury laws. As said by Burgess, J., in *Meroney v. Atlanta B. & L. Assn.*, 116 N. C. 882. 47 Am. St. Rep. 841, 21 S. E. 924, in construing a similar statute where a like attempt was made to evade the usury laws, such an association "is merely a money lending, dividend paying corporation, to which, for some purpose, some features of a 'building and loan association' have been attached." Our act of 1874 under which the defendant was incorporated points out explicitly the manner in which the business of such associations shall be conducted, and protection of needy borrowers requires the courts to compel a strict compliance with its provisions. The language of the act is mandatory as to the manner in which loans shall be made, and provides that the money of the association "shall be offered for loan in open meeting, and the stockholder who shall bid the highest premium for the preference of priority of <sup>523</sup> loan shall be entitled to receive a loan." Failing to observe this positive command of the statute the defendant association cannot invoke the aid of its charter to protect it from the penalty of usury. The privileges and immunities of such corporations are secured by adhering strictly to the law of their creation, and when, as here, they violate that

law, they cannot shield themselves from the consequences which the laws of the commonwealth justly inflict upon the usurer.

The decree is affirmed.

Mitchell, C. J., dissents.

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*Whether It is Usury for a Building and Loan association to exact the payment of premiums in addition to legal interest is discussed in the notes to Robertson v. American Homestead Assn., 69 Am. Dec. 160-162; Bank of Newport v. Cook, 46 Am. St. Rep. 200; and in the subsequent cases of Meroney v. Atlanta Bldg. etc. Assn., 116 N. C. 882, 47 Am. St. Rep. 841; Washington Investment Assn. v. Stanley, 38 Or. 319, 84 Am. St. Rep. 793; McDonnell v. De Soto Sav. etc. Assn., 175 Mo. 250, 97 Am. St. Rep. 592; Home Bldg. etc. Assn. v. McKay, 217 Ill. 551, 108 Am. St. Rep. 263.*

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### ALLES v. LYON.

[216 Pa. 604, 66 Atl. 81.]

**TENANCY BY ENTIRETIES—Municipal Lien.**—If a husband and wife are registered owners by entireties of a city lot, and a municipal lien is filed against the wife alone, upon which judgment is entered against her only, the lien, as to her husband, is a nullity, and a sale thereunder passes no title, and if the wife buys at such sale, she buys nothing that she did not have before, namely, her own right of survivorship. (p. 792.)

**TENANCY BY ENTIRETIES—Effect of Divorce.**—If a husband and wife hold an estate as tenants by entireties, and are subsequently divorced, the divorce does not change the tenancy into a tenancy in common. (p. 792.)

**TENANCY BY ENTIRETIES.**—An estate by entireties is one held by husband and wife by virtue of title acquired by them jointly after marriage, and as they are regarded in law as one person, they do not take in parts or shares, like joint tenants or tenants in common, but each takes the whole. Incident to this estate as to joint tenancy is the right of survivorship, with this difference, that on the death of the husband or wife the survivor takes no new title or estate, as he or she is in possession of the whole from its inception. (pp. 792, 793.)

**TENANCY BY ENTIRETIES—Divorce—Ejectment.**—If a husband and wife holding an estate by entireties are divorced, she is not entitled to bring an action of ejectment against her divorced husband, and his failure to appear and answer is immaterial. (p. 794.)

J. W. Thomas, for the appellant.

W. H. Lemon, for the appellee.

605 MITCHELL, C. J. It appears by the case stated that the husband and wife were registered owners by entireties of the lot in question when the municipal lien was filed against the wife alone. Judgment on it was entered against her only, and though the *levari facias* avers that it was issued "with notice to John P. Reis" (the husband), yet, as said by the learned judge below, it does not appear that any such notice was given. As against the husband, therefore, the lien was a nullity, and the sale under it passed no title: *Simons v. Kern*, 92 Pa. 455; *Ferguson v. Quinn*, 123 Pa. 337, 16 Atl. 844.

There is no question involved about attacking a judgment collaterally, as the record shows the want of jurisdiction in the court to render such judgment.

606 When, therefore, the wife bought at the sale she bought nothing that she did not have before, her own right of survivorship. But even if the whole title had been divested by the sale she would have bought under an obligation as trustee for her husband as cotenant, and could not have ousted him in that way. She therefore acquired nothing as against him by the sale.

Coming now to the main question in the case, we are of opinion that the court below erred in holding that the estate by entireties was severed by the subsequent divorce of the husband and wife.

The subject is very bare of authorities. The law as to divorce prevented this question from arising in the earlier English cases, and in the few cases reported in this country the decisions, all more or less affected by statutes, are at variance, with no clear preponderance in either way. *Lewis' Appeal*, 85 Mich. 340, 24 Am. St. Rep. 94, 48 N. W. 580, may be regarded as the best discussion in favor of the view that the nature of the estate is not changed, and *Ames v. Norman*, 36 Tenn. 683, 70 Am. Dec. 269, as the best on the other side.

The question has not previously come before this court, and we are left to decide it on general principles.

An estate by entireties is one held by husband and wife by virtue of title acquired by them jointly after marriage. Being regarded as one person in law they take not in parts or shares, like joint tenants or tenants in common, but each



takes the whole, or in the ancient phrase they are seised, not *per mi et per tout*, but *per tout* only. Incident to this estate as to joint tenancy is the right of survivorship, with this difference, that on the death of husband or wife the survivor takes no new title or estate; he or she is in possession of the whole from its inception. It was early held that our act of March 31, 1812 (5 Sm. L. 395), abolishing survivorship in joint tenancy, did not affect estates by entireties: *Robb v. Beaver*, 8 Watts & S. 107 (111); and the same view has been taken of the married women's acts of April 11, 1848 (Pub. Laws 536), and later: *Diver v. Diver*, 56 Pa. 106; *Bramberry's Estate*, 156 Pa. 628, 36 Am. St. Rep. 64, 27 Atl. 405, 22 L. R. A. 594.

The general subject of estates by entireties is learnedly discussed by Lewis, C. J., in *Stuckey v. Keefe's Exrs.*, 26 Pa. 397, our leading case. It was there held that a conveyance to husband and wife, their heirs and assigns, "as tenants in <sup>607</sup> common and not as joint tenants" created an estate by entireties, and the opinion was strongly expressed that the estate arose by virtue of "a rule of law founded on the rights and incapacities of the matrimonial union," and therefore that the intention was immaterial. No subsequent case has gone so far, and in *Merritt v. Whitlock*, 200 Pa. 50, 49 Atl. 786, it was said that it may be considered as still an open question whether husband and wife may not, since the married women's property acts, take as well as hold in common if that be the clear actual intent, notwithstanding the presumption to the contrary.

The argument for the change by divorce from an estate by entireties to a tenancy in common rests on the assumption that as the basis of the estate is the unity of person, a severance of that unity carries with it a severance of the estate; that as after divorce an estate by entireties could not be created between the parties it cannot be continued. But this view fails to give due weight to the rule that the quality of the estate is determined at its inception. It arises not out of unity of person alone, but out of unity of person at the time of the grant. "If an estate be made to a man and woman and their heirs, before marriage, and after(ward) they marry, the husband and wife have moieties between them": Coke's Littleton, 187b; and see 2 Cruise's Digest,

494, and 2 Plowden, 483, cited in *Stuckey v. Keefe's Exrs.*, 26 Pa. 397. No stronger illustration could be given. If subsequent unity of person cannot change a tenancy in common to one by entireties, e converso a subsequent severance of the unity of person ought not to change a tenancy by entireties to one in common. In entire accordance is our latest case, *Hetzel v. Lincoln*, 216 Pa. 60, 64 Atl. 866, where a conveyance to husband and wife "jointly" was held to create an estate by entireties which continued with its incident of survivorship, although the husband had conveyed his interest to the wife as "the undivided one-half" and they had subsequently executed a mortgage in which the conveyance by the husband was referred to. A creditor had obtained a judgment against the husband and after his death sought to revive it against his administrator, with notice to the wife as terretenant, on the ground that they had become tenants in common, but it was held that he could take nothing. "Whatever may have been the intention of the husband," said our Brother Brown, "the <sup>608</sup> right of the wife was fixed by the deed from Reed. By it each held an entirety and upon the death of either the estate would vest absolutely in the other as the survivor. The husband conveyed nothing to the wife that she would not have enjoyed if she survived him, which she did." The decisions and the statutes referred to go to show that in regard to the nature and qualities of an estate by entireties the general rule of law applies that they are determined at the inception of the estate.

In the present case, therefore, the parties took an estate by entireties at the time of the grant. By it the husband took a vested estate to which was incident a right of survivorship. That estate could not be divested, or stripped of any of its incidents except by express statutory provision existing at the time of its inception. The divorce severed the unity of person for the future, but it could not avail retrospectively to sever the vested unity of title and possession.

The learned court below gave much weight to the judgment of rule absolute to bring ejectment. But the rule was a nullity. By the terms of the statute it was a rule to bring ejectment or "show cause why the same cannot be so

brought." The petition for the rule disclosed that the parties held by entireties, and that the petitioner had no other or better title than the husband upon whom the rule was asked. Without regard to actual occupation the husband was in legal possession, and could not bring ejectment against his cotenant: *Martin v. Jackson*, 27 Pa. 504, 67 Am. Dec. 489; and the court could not make a vain order requiring him to do what the law determined he could not do. The petitioner's occupation could not be adverse, because no matter how long continued it was in entire accordance with her husband's title as well as her own. The act of 1889 is an act to facilitate the settlement of disputed or disputable claims to land. But it was not intended to overturn the settled principles of law. As the petition showed that the rule asked for, even if granted, would have to be discharged the rule should not have been granted. Ordinarily, questions of title await the return of the rule for disposition: *Titus v. Bindley*, 210 Pa. 121, 59 Atl. 694; *Fearl v. Johnstown*, 216 Pa. 205, 65 Atl. 549. But in the present case that was unnecessary and the default provided for in the statute, the failure to appear and answer, was <sup>609</sup> immaterial, because the face of the record already answered the requirement of the rule by showing "cause why the ejectment cannot be so brought."

Judgment reversed and judgment directed to be entered for defendant.

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*Land Held by Husband and Wife* as tenants by entireties is not liable to be sold on execution to satisfy a judgment against him alone: *Mercer v. Coomler*, 32 Ind. App. 533, 102 Am. St. Rep. 252.

*A Divorce Converts an Estate* held by the parties by entireties into a tenancy in common: *Donegan v. Donegan*, 103 Ala. 488, 49 Am. St. Rep. 53; *Hopson v. Fowlkes*, 92 Tenn. 697, 36 Am. St. Rep. 120; *Stelz v. Shreck*, 128 N. Y. 263, 26 Am. St. Rep. 475.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**UTAH.**

**NICHOLS v. DAILY REPORTER COMPANY.**

[30 Utah, 74, 83 Pac. 573.]

**LIBEL—Publication of Indebtedness—Libel Per Se.**—To write and publish of one, not a trader or merchant and not of or concerning his business affairs, that he is indebted to another, and, though able to pay, has neglected or refused to do so, is not such an impeachment of his honesty, nor does it import such degradation of morals or character, nor so expose him to public hatred or ridicule nor so tend to disgrace him, that it can be said as matter of law or by a presumption of evidence, that such publication is libelous per se, and must necessarily occasion damage and pecuniary loss to him, and he is not entitled to recover therefor without proof that the publication was actuated by malice and that he has suffered actual damages. (p. 800.)

**LIBEL—Publication of Indebtedness—Libel Per Se.**—To write and publish of a certain person, who is a candidate for office, that he owes a debt to the publisher and has not paid it, is not of itself sufficient to make the publication libelous, when such person is not engaged in business, or when it is not said of or concerning him in the conduct of his trade or business, but such words may become libelous by proof of extraneous circumstances if special damages are shown. (pp. 800, 801.)

**LIBEL—Candidate for Office.**—The fact that one is a candidate for office affords in many instances a legal excuse for publishing language concerning him as such candidate, for which publication there could be no legal excuse if he did not occupy the position of such candidate, and to publish of one candidate for office that he is honest does not carry the implication that another candidate, disparagingly spoken of, is dishonest. (p. 802.)

D. S. Truman and Farnsworth & Lund, for the appellant.

Henderson, Pierce, Critchlow & Banette, for the respondent.

**75 STRAUP, J.** 1. The appellant, plaintiff below, brought this action against the respondent to recover damages for  
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libel. It is alleged in <sup>76</sup> the complaint that while the plaintiff was a candidate for election to an office in the Typographical Union at Salt Lake City, and also a candidate for delegate to the annual convention of the National Typographical Union to be held at Washington, D. C., the defendant printed and published a card, on one side of which were the words, "Vote for Honest Jake Bosch for Delegate," and on the other: "Explanatory. Mr. C. A. Nichols owes the Daily Reporter Co. a balance of \$34.52 for printing done in 1894. Draw your own conclusions and vote for Mr. Nichols, if you think he is not able to pay this debt." It is further alleged, "meaning thereby the plaintiff herein, although able to pay his debts and obligations, was dishonest, and was making accounts which he never paid nor intended to pay, and was wholly unfit and unworthy of credit or to be trusted to fill the position" sought by him, and to bring him "into contempt and ridicule"; that said publication was false and defamatory, and for the purpose of defeating his election; and that he was damaged "in his reputation, good repute, and credit." It is not alleged in the complaint that the publication caused his defeat or aided in so doing. No special damages are alleged or proven. The evidence shows the defendant printed and circulated about one hundred of said cards at Salt Lake City among members of the said union and electors at said election. As to whether the plaintiff owed the debt there was some conflict in the evidence. He denied owing it. The court, among other things, in substance, instructed the jury that the "card does not contain matter that is libelous per se"; that "no damage can be inferred from the mere fact that the card was published and that it was false"; that before a verdict could be returned for plaintiff "it must be shown by evidence, outside of the publication, that the defendant was actuated by malice or ill-will toward the plaintiff, and that he has suffered actual damage thereby." The jury returned a verdict for plaintiff for one dollar. He appeals.

2. It is conceded by appellant that no special damages were alleged in the complaint, and none proven at the trial. The principal point urged by him is that the alleged words were libelous per se, that the court erred in telling the jury otherwise, and in directing them that no damage could be inferred from the mere fact of the publication, and that it was false.

77 3. We are of the opinion that the alleged article was not libelous per se; and as no special damages were averred in the complaint, and none proven at the trial, plaintiff was not entitled to a verdict. It, of course, is conceded that written derogatory or disparaging words which impute to a person the commission of a crime, or degradation of character, or which have a tendency to injuriously affect him in his office or trust, profession, trade, calling, or business, or which tend to degrade him in society, or expose him to public hatred, contempt, or ridicule, are libelous and actionable. It also is the well-recognized rule that when the words are libelous per se, it is not necessary to allege or prove special damages, for malice and damage are implied; but where they are not libelous per se, special damages must be averred and proven to warrant a recovery. The important question, therefore, is, When can it be said that the publication of an article is libelous per se, and does this one fall under such class? Some authorities say, whether a publication is libelous per se is to be determined wholly by the sense in which the same is usually understood; others, that it is to be determined by whether the article is susceptible of but one construction, and that one of harmful meaning; that is to say, if the article is susceptible of two meanings, one innocent and the other harmful, it is not libelous per se. Again, expressions are found in the cases that, if a colloquium or innuendo is necessary to render the language libelous, it is not per se libelous. Still another test, and the one which we think is the correct one, and which is supported by the greater weight of authority, is:

“When language is used concerning a person or his affairs which from its nature necessarily must, or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, its publication” is libelous per se: *Townshend on Libel and Slander*, 4th ed., secs. 146, 147; *Fry v. McCord*, 95 Tenn. 678, 33 S. W. 568.

“The nature of the writing must be such that the court can legally presume” that the plaintiff has been damaged: 13 *Am. & Eng. Ency. of Law*, 2d ed., 916.

“From some sort of false report the law presumes conclusively that damage has followed, and the plaintiff need neither allege nor prove it. Here the language is styled libelous per se. . . . Except where this presumption exists, special damages to the plaintiff's reputation <sup>78</sup> must be alleged and proved to have been the actual and natural result of the lan-

guage used": *McLoughlin v. American Cir. Loom Co.*, 125 Fed. 203, 60 C. C. A. 87.

This principle is also recognized and well stated in *Pratt v. Pioneer Press Co.*, 35 Minn. 251, 28 N. W. 708.

Tested by these principles, can it be said that the nature and character of the language here contained in the alleged article was such as not only as a natural and proximate, but as a necessary, consequence its publication occasioned plaintiff damages? We think the article does not warrant the indulgence in such presumption. To do so the court ought to be able to see that as a necessary consequence plaintiff was damaged in some material manner: *Foster v. Boue*, 38 Ill. App. 613.

It must, of course, be conceded that the article does not charge or impute the commission of any crime or moral degradation. Nor can it fairly be said it exposed plaintiff to public hatred, or ridicule, or tended to disgrace him. It is, however, said that the words "did impute to the plaintiff dishonesty in his vocation," from which it is argued that the article is libelous per se. We think the article is not open to such construction. The evidence shows that the plaintiff was a typographer. We see nothing in this article which in any manner reflects upon the plaintiff in such or any trade, or profession, or calling, or affects him in a position of office or trust. A complete answer, however, to such contention is that the plaintiff did not, by way of innuendo or otherwise, place such a meaning upon the article; and, furthermore, it does not upon its face charge or import such meaning. An entirely different meaning by way of innuendo was placed upon it. "Where plaintiff alleges a special meaning for the alleged libelous words sued on, that is the only meaning which the defendant need meet in pleading or on trial": *Wuest v. Brooklyn Citizen*, 38 Misc. Rep. 1, 76 N. Y. Supp. 706.

However, had the plaintiff charged such meaning to the article it would have been, of no avail, for the article is not fairly or even at all susceptible of such construction, and an innuendo cannot enlarge the meaning of words or attribute to them a meaning which they will not bear: 18 Am. & Eng. Ency. of Law, 182.

<sup>79</sup> Likewise, to say, as was said here, by way of innuendo, that the plaintiff was brought into contempt and ridicule, or was unfit to fill the position sought by him, gives no strength to the complaint, and amounts to nothing unless the words

themselves import such charges: *Divens v. Meredith*, 147 Ind. 633, 47 N. E. 143.

We, therefore, have left in the article the statement, in effect, that the plaintiff was indebted to the defendant, that the obligation has not been paid and an inference that plaintiff was able to pay. Here again, by way of innuendo, it is charged, "thereby meaning that the plaintiff had incurred an indebtedness which he never intended to pay." It may be, to write and publish of one that he incurred an obligation or debt with the intention not to pay it, involves fraudulent doings and wrongful conduct, and may be per se actionable; especially if written of or concerning a trader or a merchant. But the language of the article does not bear the construction that the plaintiff had fraudulently or at all wrongfully incurred the indebtedness, and so again, by way of innuendo merely enlarging the meaning of the words gives no strength to the complaint. We then have the question reduced to the following proposition: To write and publish of one not a trader or merchant, and not of or concerning his business affairs, that he is indebted to another, and, though able to pay, has neglected or refused to do so, is that such an impeachment of honesty, or does it import such degradation of morals or character, or expose him to public hatred or ridicule, or tend to disgrace him, as a court can say its publication necessarily must, in fact, or, by a presumption of evidence, occasion damage and pecuniary loss to him, and, therefore, he was relieved from otherwise alleging or proving any? We think not. We are not saying that such language may not, as a natural and proximate consequence, occasion loss and damage; but the plaintiff, in order to recover, must allege and prove them.

"To publish of one that he has for several years owed for medical services; that his attention has been repeatedly called thereto to no purpose; that finally, being sued therefor, he, having no other defense, has cowardly slunk behind that of the statute of limitations; and that such a course is not in accordance with the writer's idea of strict integrity," <sup>80</sup> was held not libelous per se: *Hollenbeck v. Hall*, 103 Iowa, 214, 64 Am. St. Rep. 175, 72 N. W. 518, 39 L. R. A. 734.

So, to publish of one that he was indebted for a bill, but would not pay it, unless a certain sum was "knocked off," and that it was a "dirty Jew trick to try to beat the house," was held not libelous per se: *Hanaw v. Jackson Patriot Co.*,



98 Mich. 506, 57 N. W. 734. It was held not libelous per se to write and publish that J. D. U. should not be employed in the stock business or to transact any business with him at the stockyards until notified that he had settled with K. & S. for twenty head of cattle bought of them: *Ulery v. Chicago Livestock Ex.*, 54 Ill. App. 233. It was also held that a publication in an abstract of unsettled accounts issued by a mercantile agency of a memorandum that a person, not a merchant or trader, was indebted in a certain sum, and that it had not been paid, was not libelous per se: *Ery v. McCord*, 95 Tenn. 678, 33 S. W. 568.

A notice published in a newspaper warning all persons against trading for two notes alleging that the plaintiff had obtained them without consideration from a person whose mental condition at the time was such as incapacitated him for business is not libelous per se: *Trimble v. Anderson*, 79 Ala. 514. To publish in a newspaper: "Wanted, E. B. Zier, M. D., to pay a drug bill, his room rent, and not go dead-heading his way," was held not libelous per se: *Zier v. Hofflin*, 33 Minn. 66, 53 Am. Rep. 9, 21 N. W. 862. The following cases also illustrate that this character of language is not per se libelous: *Homer v. Engelhardt*, 117 Mass. 539; *Wuest v. Brooklyn Citizen*, 38 Misc. Rep. 1, 76 N. Y. Supp. 706; *Donaghue v. Gaffy*, 53 Conn. 43, 2 Atl. 397, 54 Conn. 257, 7 Atl. 552; *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747.

We think it is quite generally recognized that to write and publish that a party owes a debt, and has not paid it, is not of itself sufficient to make the publication libelous when such person is not engaged in business, or when it is not said of or concerning him in the conduct of his trade or business; but that such words may be made libelous by proof of extraneous circumstances if special damages are shown. It may be conceded that words charging nonpayment of debts, insolvency, or which tend to impute want of credit or integrity, are actionable without alleging special damages when they refer to <sup>81</sup> merchants, tradesmen, and others in occupations where credit is essential to the successful prosecution; but, generally, these same words are not per se actionable when they do not refer to persons in their office, profession, trade, business, or calling. These matters are well illustrated by *Newell*, second edition, pages 192-197. To write and publish of a tradesman in his business that he is insolvent, or that he owes a debt

of long standing which he has not paid, must necessarily impair his credit, be harmful to his business, and result to his damage. But such presumption does not necessarily follow where such words refer merely to an individual, separate and distinct from any trade, business or calling. Such words, however, may be rendered libelous by the place and circumstances of their publication, or by proof of extraneous matters together with proof of damages other than those implied when shown to be the natural and proximate consequence of the publication. It is also claimed by appellant that by the expression, "Vote for Honest Jake Bosch," is implied that appellant, who was also a candidate, was dishonest. It does not bear such construction. To say of one candidate that he is honest does not carry the implication that the other candidates are dishonest. If these words by themselves were susceptible of such construction, it is certainly overcome by the explanation following, where again we are brought to the statement of indebtedness. It may be well also here to note that these cards were circulated only among the members of the Typographical Union at Salt Lake City, which was occasioned by the candidacy of appellant and Bosch for delegate to the convention of the National Typographical Union. The fact that one is a candidate for an office affords, in many instances, a legal excuse for publishing language concerning him as such candidate, for which publication there would be no legal excuse if he did not occupy the position of such candidate: *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757; *Greenwood v. Cobbey*, 26 Neb. 449, 42 N. W. 413.

From what has been said, it necessarily follows that the judgment ought to be, and it therefore is, affirmed, with costs.

McCarthy, J., concurs.

Bartch, C. J., dissents.

#### WHAT WORDS ARE LIBELOUS PER SE.

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**I. Scope of Note.**

We shall discuss the subject of this note with the idea of setting forth the rules of law applicable to the different kinds of statements which may be made respecting the person alleged to have been libeled, but we shall not attempt to set forth the specific language complained of in the various decisions. The question, what libelous statements are privileged, was considered in the monographic note to *Holmes v. Clisby*, 104 Am. St. Rep. 110.

**II. General Nature of the Action of Libel.**

Reputation is undoubtedly property: *Dixon v. Holden*, L. R. 7 Eq. 492. And, as was said by Mr. Justice Campbell in discussing the constitutionality of a statute limiting recoveries in cases of libel against newspapers: "There is no room for holding, in a constitutional system, that private reputation is any more subject to be removed by statute from full legal protection than life, liberty or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief": *Park v. Detroit Free Press Co.*, 72 Mich. 560, 16 Am. St. Rep. 544, 40 N. W. 731, 1 L. R. A. 599. So, also, in a recent libel case in Kansas involving the constitutionality of a similar statute it was observed: "From the writings of the world's wisest man we have the assurance that 'a good name is rather to be chosen than great riches'; yet the possessor of this thing of greatest value,

being despoiled of it, is left by the statute in question entirely without remedy for its loss, except in such rare cases where he may be able to show some exact financial injury in the particulars named. We could not excuse ourselves for holding that reputation is less valuable than property, or that by the quoted provision of the Bill of Rights it is less protected from spoliation": *Hanson v. Krehbiel*, 68 Kan. 670, 10 Am. St. Rep. 422, 75 Pac. 1041, 64 L. R. A. 790.

The basis of an action for libel is the damages for the injury to character in the opinion of others: *Lyle v. Clason*, 1 Caine, 581. If defamatory language is libelous per se, the law presumes general damages as the natural and probable consequences: *Tracey v. Hackett*, 19 Ind. App. 133, 65 Am. St. Rep. 398, 49 N. E. 185. That is, the nature of the libel must be such that the court can legally presume that the plaintiff has been injured in his business, or in his social relations, or has been subjected to public scandal, scorn, or ridicule in consequence of the publication: *Stewart v. Minnesota Tribune Co.*, 40 Minn. 101, 12 Am. St. Rep. 696, 41 N. W. 457.

### III. General Statement of the Rule Respecting Words Libelous Per Se.

Inasmuch as the general state of public morals varies from place to place and from time to time, it is difficult to formulate a general rule which will cover the use of words which are actionable in themselves. It may, however, be said in a general way that words which tend to expose the plaintiff to public hatred, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace and cause him to be lowered in the minds of right thinking people and be deprived of their friendship and society are libelous and actionable per se: *Obaugh v. Finn*, 4 Ark. 110, 37 Am. Dec. 773; *Wilson v. Fitch*, 41 Cal. 363; *Republican Pub. Co. v. Mosman*, 15 Colo. 399, 24 Pac. 1051; *Atwater v. Morning News Co.*, 67 Conn. 504, 34 Atl. 865; *Rice v. Simmons*, 2 Harr. 417. 31 Am. Dec. 766; *Montgomery v. Knox*, 23 Fla. 595, 3 South. 211; *Stewart v. Swift Specific Co.*, 76 Ga. 280, 2 Am. St. Rep. 40; *Augusta Evening News v. Radford*, 91 Ga. 494, 44 Am. St. Rep. 53, 17 S. E. 612, 20 L. R. A. 533; *Cerveney v. Chicago Daily News Co.*, 139 Ill. 345, 28 N. E. 692, 13 L. R. A. 864; *Prosser v. Collis*, 117 Ind. 105. 19 N. E. 735; *Stewart v. Pierce*, 93 Iowa, 136, 61 N. W. 388; *Kirkpatrick v. Eagle Lodge No. 23*, 26 Kan. 384, 40 Am. Rep. 316; *Riley v. Lee*, 88 Ky. 603, 21 Am. St. Rep. 358, 11 S. W. 713; *Tillson v. Robbins*, 68 Me. 295, 28 Am. Rep. 50; *Negley v. Farron*, 60 Md. 155. 45 Am. Rep. 715; *Miller v. Butler*, 6 Cush. 71, 52 Am. Dec. 768; *Loker v. Campbell*, 163 Mass. 242, 39 N. E. 1038; *Smith v. Smith*, 73 Mich. 445, 16 Am. St. Rep. 594, 41 N. W. 499, 3 L. R. A. 52; *State v. Shipman*, 83 Minn. 441, 86 N. W. 431; *Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215; *Williams v. Fuller*, 68 Neb. 354, 94 N. W. 118, 97 N. W. 246; *Feder v. Herrick*, 43 N. J. L. 24; *Moore v. Francis*, 121 N. Y. 199, 18 Am. St. Rep. 810, 23 N. E. 1127,

8 L. R. A. 214; *Morey v. Morning Journal Assn.*, 123 N. Y. 207, 20 Am. St. Rep. 730, 25 N. E. 161, 9 L. R. A. 621; *Simmons v. Morse*, 51 N. C. 6; *Lander v. Jones*, 13 N. Dak. 525, 101 N. W. 907; *State v. Mason*, 26 Or. 273, 46 Am. St. Rep. 629, 38 Pac. 130, 26 L. R. A. 779; *Wood v. Boyle*, 177 Pa. 620, 55 Am. St. Rep. 747, 35 Atl. 853; *Fonville v. McNease*, Dud. 303, 31 Am. Dec. 556; *Haws v. Stanford*, 4 Sneed, 520; *Walker v. San Antonio Light Pub. Co.*, 30 Tex. Civ. Rep. 165, 70 S. W. 555; *Colby v. Reynolds*, 6 Vt. 489, 27 Am. Dec. 574; *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 455; *Moss v. Harwood*, 102 Va. 386, 46 S. E. 385; *Bradley v. Cramer*, 59 Wis. 309, 48 Am. Rep. 511, 18 N. W. 268; *Buckstaff v. Viall*, 84 Wis. 129, 54 N. W. 111; *White v. Nicholls*, 3 How. 266, 11 L. ed. 591.

#### IV. Distinction Between Libel and Slander With Respect to Words That are Actionable in Themselves.

"A distinction has long been known and recognized between oral and written slander. Words when committed to writing and published are considered as libelous, which, if only spoken, would not subject the person speaking to any action. Perhaps it is to be regretted that a distinction was ever made between oral and written slander; and if it was a new question, no distinction would now be made. The reasons which have been given for the distinction have been questioned both by writers and judges of eminence. It has been made, however, and has become part of the law, and as such we must receive it. There can be no question but that a slander, written and published, evinces a more deliberate intention to injure, is calculated more extensively to circulate the accusation, and to provoke the person accused to take the means of redress into his own hands, and thus to commit a breach of the peace, than mere oral slander which is spoken and soon forgotten": *Colby v. Reynolds*, 6 Vt. 489, 27 Am. Dec. 574. Hence it follows that many words which would not sustain an action of slander if spoken will sustain an action for libel if written: *Watson v. Trask*, 6 Ohio, 531, 27 Am. Dec. 271. In slander many mere defamatory words are regarded as transitory abuse of not sufficient substance and body to constitute an injury to reputation, whereas the same words, if written, would constitute a libel: *Byram v. Aiken*, 65 Minn. 87, 67 N. W. 807.

#### V. Necessity for Damage to be the Natural and Proximate Consequence of the Words Used.

In order to render words libelous per se, their injurious character must appear upon their face. The nature of the language used must be such that the court can legally presume that the plaintiff has been damaged as a natural and proximate consequence from the use of the words employed in the publication. The words must be of such a character that a presumption of law will arise therefrom that the plaintiff has been degraded in the estimation of his friends or of

the public, or has suffered some other loss either in his property, character, reputation or business or in his domestic or social relations: *Clarke v. Fitch*, 41 Cal. 472; *Foster v. Bone*, 38 Ill. App. 613; *Wabash R. Co. v. Young*, 162 Ind. 102, 69 N. E. 1003, 4 L. R. A., N. S., 1091; *Quinn v. Prudential Ins. Co.*, 116 Iowa, 522, 90 N. W. 349; *Tillson v. Robbins*, 68 Me. 295, 28 Am. Rep. 50; *Park v. Detroit Free Press Co.*, 72 Mich. 560, 16 Am. St. Rep. 544, 40 N. W. 731, 1 L. R. A. 599; *Stewart v. Minnesota Tribune Co.*, 40 Minn. 101, 12 Am. St. Rep. 696, 41 N. W. 457; *Illinois Cent. R. Co. v. Ely*, 83 Miss. 519, 35 South. 873; *Crashley v. Press Pub. Co.*, 179 N. Y. 27, 71 N. E. 258; *De Fronsac v. News Co. (R. I.)*, 35 Atl. 1046; *Mayrant v. Richardson*, 1 Nott. & M. 347, 9 Am. Dec. 707; *Fry v. McCord*, 95 Tenn. 678, 33 S. W. 568; *Nichols v. Daily Reporter Co.*, 30 Utah, 74, ante, p. 796, 83 Pac. 573, 3 L. R. A., N. S., 339; *Urban v. Helmick*, 45 Wash. 155, 45 Pac. 747; *Gillan v. State Journal etc. Co.*, 96 Wis. 460, 71 N. W. 892.

The rule in this respect was clearly stated by Mr. Justice Mitchell in *Pratt v. Pioneer Press Co.*, 35 Minn. 251, 28 S. W. 708, wherein he said: "When language is used concerning a person or his affairs which, from its nature, necessarily must, or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, its publication prima facie constitutes a cause of action, and prima facie constitutes a wrong, without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication; and this is all that is meant by the term 'actionable per se.' Therefore, the real practical test, by which to determine whether special damage must be alleged and proved in order to make out a cause of action for defamation, is whether the language is such as necessarily must, or naturally and presumably will, occasion pecuniary damage to the person of whom it is spoken."

#### VI. Necessity for the Words Used to have Relation to the Plaintiff.

The libelous language need not name the plaintiff as the person to whom it refers. It is sufficient if the fact that the plaintiff is the person intended to be libeled can be ascertained from the words of description or other references made by the publication, or even if the fact can be shown by extrinsic facts and circumstances: *Weir v. Hoss*, 6 Ala. 881; *Colvard v. Black*, 110 Ga. 642, 36 S. E. 80; *Nicholson v. Rust*, 21 Ky. Law Rep. 645, 52 S. W. 933; *Dressel v. Shipman*, 57 Minn. 23, 58 N. W. 684; *Palmer v. Bennett*, 83 Hun, 220, 31 N. Y. Supp. 567; *Clark v. North American Co.*, 203 Pa. 346, 53 Atl. 247; *Clark v. Creitzburgh*, 4 McCord, 491; *Whitford v. Smith*, 19 S. Dak. 158, 102 N. W. 1135. Indeed, it is sufficient if those who know the plaintiff can understand from the language used that he is the person referred to: *Lewis v. Soule*, 3 Mich. 514. With respect to libels of a class or number of persons, see the monographic note attached to *Jones v. State*, 70 Am. St. Rep. 754.

**VII. General Rule in Regard to Construing the Language Used.**

**a. In General.**—In construing a publication alleged to be libelous the whole article is to be read and considered together, and such construction put upon the language used as would naturally be given to it: *St. James Military Academy v. Gaiser*, 128 Mo. 517, 46 Am. St. Rep. 502, 28 S. W. 851, 28 L. R. A. 667. "Some authorities say whether a publication is libelous per se is to be determined wholly by the sense in which the same is usually understood. Others, that it is to be determined by whether the article is susceptible of but one construction, and that one of harmful meaning; that is to say, if the article is susceptible to two meanings, one innocent and the other harmful, it is not libelous per se. Again, expressions are found in the cases that if a colloquium or innuendo is necessary to render the language libelous, it is not per se libelous. Still another test, and the one which we think is the correct one, and which is supported by the greater weight of authority is, 'when language is used concerning a person or his affairs which from its nature necessarily must, or presumably will as its natural and proximate consequence, occasion him pecuniary loss, its publication' is libelous per se *Townshend on Slander and Libel*, 4th ed., secs. 146, 147; *Fry v. McCord Bros.*, 95 Tenn. 678, 33 S. W. 568: 'The nature of the writing must be such that the court can legally presume' that the plaintiff has been damaged': *Nichols v. Daily Reporter Co.*, 30 Utah, 74, ante, p. 796, 83 Pac. 573, 3 L. R. A., N. S., 339. Of course a charge of crime to be libelous need not be expressed in the technical language essential to a good indictment, if the obvious meaning of the words employed is to impute to a person the commission of a crime or subject him to public ignominy or disgrace: *World Pub. Co. v. Mullen*, 43 Neb. 126, 47 Am. St. Rep. 737, 61 N. W. 108. "The rule of construction as to slanderous words has, in the history of jurisprudence, undergone several changes. At one time a rigid construction prevailed; at other times, the words were to be understood in mitiori sensu; but the rule, as now settled, is to construe the words in that sense which is most natural and obvious—in the plain and popular sense in which the rest of the world understands them": *Coburn v. Harwood*, Minor, 93, 12 Am. Dec. 37. In other words, the rule which now obtains is the one which was expressed by the supreme court of North Dakota in *Lander v. Jones*, 13 N. Dak. 525, 101 N. W. 907, wherein the court said: "The proper rule for our guidance in determining this question is that announced by Lord Mansfield in *Peake v. Oldham*, Cowp. 275, and approved in *Goodrich v. Woolcott*, supra [3 Cow. 240]: 'Where words, from their general import, appear to have been spoken to defame a party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptation and meaning of them.' In other words, it is the duty of the courts to see what the rest of mankind sees, and to understand the meaning of the writing as the rest of mankind understands it, and

to place itself in the position of an unbiased reader of ordinary intelligence, and thus determine the meaning which the language, considered in its natural and proper sense, was intended and calculated to convey: *Carter v. Andrews*, 16 Pick. 1; *Hotchkiss v. Olmstead*, 37 Ind. 74; *Commonwealth v. Child*, 13 Pick. 198; *World Pub. Co. v. Mullen*, 43 Neb. 126, 61 N. W. 108, 47 Am. St. Rep. 737; *Ayres v. Toulmin*, 74 Mich. 44, 41 N. W. 855; *Spencer v. Southwick*, 11 Johns. 259; *Tillson v. Robbins*, 68 Me. 295, 28 Am. Rep. 50; *Townshend on Slander and Libel*, 177; *Newell on Slander and Libel*, *secs.* 31, 42."

The same rule, as above stated, has also been approved in many other cases: *Sternan v. Marx*, 58 Ala. 608; *Edwards v. San Jose etc. Soc.*, 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128; *Arnott v. Standard Assn.*, 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69; *Western Union Tel. Co. v. Pritchett*, 108 Ga. 411, 34 S. E. 216; *Gunton v. Hughes*, 79 Ill. App. 661; *Harrison v. Findley*, 23 Ind. 265, 85 Am. Dec. 456; *Truman v. Taylor*, 4 Iowa, 424; *McGowan v. Manifee*, 7 T. B. Mon. 314, 18 Am. Dec. 178; *Simons v. Lewis*, 51 La. Ann. 327, 25 South. 406; *Thompson v. Lewiston etc. Pub. Co.*, 91 Me. 203, 39 Atl. 556; *Garrett v. Dickerson*, 19 Md. 418; *Buckley v. O'Niel*, 113 Mass. 193, 18 Am. Rep. 466; *Line v. Spies*, 139 Mich. 484, 102 N. W. 993; *Johnson v. Force*, 80 Minn. 315, 83 N. W. 182; *Rodgers v. Kline*, 56 Miss. 803, 31 Am. Rep. 389; *Butterfield v. Buffum*, 9 N. H. 156; *Ogden v. Riley*, 14 N. J. L. 186, 25 Am. Dec. 513; *Hayes v. Ball*, 72 N. Y. 418; *Hamilton v. Smith*, 19 N. C. 274; *Lukehart v. Byerly*, 53 Pa. 418; *Eifert v. Sawyer*, 2 Nott. & M. 511, 10 Am. Dec. 633; *Hancock v. Stephens*, 11 Humph. 507; *Forke v. Homann*, 14 Tex. Civ. App. 670, 39 S. W. 210; *Crane v. Darling*, 71 Vt. 295, 44 Atl. 359; *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 455; *Hamlin v. Fautl*, 118 Wis. 594, 95 N. W. 955. It is not necessary that the words, in order to be actionable *per se*, should make the charge complained of in express terms: *Belo v. Fuller*, 84 Tex. 450, 31 Am. St. Rep. 75, 19 S. W. 616. A libel may be made in the form of insinuation, allusion, irony or question, as well as in positive and direct terms: *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66, 30 South. 625, 55 L. R. A. 214; *Lauder v. Jones*, 13 N. Dak. 525, 101 N. W. 907.

b. *Effect Where the Language Merely Asserts a Suspicion, Belief or Opinion.*—Inasmuch as it is the effect and not the mere form of the language employed that constitutes the libel, the libel may be committed by language in the form of an insinuation: *State v. Norton*, 89 Me. 290, 36 Atl. 394; *Haynes v. Clinton Ptg. Co.*, 169 Mass. 512, 48 N. E. 275; *Democrat Pub. Co. v. Jones*, 83 Tex. 302, 18 S. W. 652. Or in the form of a mere suspicion: *Royce v. Maloney*, 58 Vt. 437, 5 Atl. 395. So, also, it may be made in the form of a belief or opinion: *Prewitt v. Wilson*, 128 Iowa, 198, 103 N. W. 365; *Simmons v. Holster*, 13 Minn. 249; *Johnson v. St. Louis Dispatch*, 2 Mo. App. 565. But the language which amounts to a mere assertion



or opinion as to what will be the future conduct or character of another is not actionable: *Fanning v. Chace*, 17 R. I. 388, 33 Am. St. Rep. 878, 22 Atl. 275, 13 L. R. A. 134.

c. **Effect Where the Language is Used Ironically or in the Form of a Question or Stated Conditionally or Disjunctively.**—Positive assertion of a charge is not necessary to constitute a writing libelous, but it may be made in the form of insinuation, allusion, irony or question: *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66, 30 South. 625, 55 L. R. A. 214; *Hotchkiss v. Oliphant*, 2 Hill, 510; *Buckstaff v. Viall*, 84 Wis. 129, 54 N. W. 111. Indeed, some of the most effective libels are committed by way of putting the libelous charges in the form of a question: *State v. Norton*, 89 Me. 290, 36 Atl. 394; *Goodrich v. Davis*, 11 Met. 473; *Barr v. Providence Telegram Pub. Co.*, 27 R. I. 101, 60 Atl. 835. And it has been held in several cases of slander that a charge of crime based upon an assumed fact is actionable where the assumed fact is known to be true: *Ruble v. Bunting*, 31 Ind. App. 654, 68 N. E. 1041; *Clarke v. Zettick*, 153 Mass. 1, 26 N. E. 234. A libelous newspaper publication against "sub-engineers or some of them" will support an action by one of them, notwithstanding the disjunctive form in which the words are used, as it may be shown at the trial that the expression "some of them" was used because the writer did not mean that all were guilty but that the plaintiff alone, or with others was guilty: *Hardy v. Williamson*, 86 Ga. 551, 22 Am. St. Rep. 479, 17 S. E. 874.

#### VIII. Rule in Respect to What Words are Libelous Per Se Under Varying Circumstances.

a. **Where the Words Tend to Disgrace, Degrade or Ostracize the Plaintiff from Society or Subject Him to Contempt or Ridicule.**—Any publication injurious to the social character of another and not shown to be true or to have been justifiably made, is actionable as being libelous: *Collins v. Dispatch Pub. Co.*, 152 Pa. 187, 34 Am. St. Rep. 636, 25 Atl. 546; *Wood v. Boyle*, 177 Pa. 620, 55 Am. St. Rep. 747, 35 Atl. 853. If words employed in an alleged libelous publication impute dishonesty or corruption to an individual, they are actionable per se: *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66, 30 South. 625, 55 L. R. A. 214. Written words imputing want of chastity to a woman are generally held to be actionable per se, although a different rule is often followed where the words are merely spoken: *Weir v. Hoss*, 6 Ala. 881; *Jacksonville Journal Co. v. Beymer*, 42 Ill. App. 443; *Spolek Denni Alasatel v. Hoffman*, 204 Ill. 532, 68 N. E. 400; *Funk v. Beverly*, 112 Ind. 190, 13 N. E. 573; *Indianapolis Journal Newspaper Co. v. Pugh*, 6 Ind. App. 510, 33 N. E. 991; *Cushing v. Hederman*, 117 Iowa, 637, 94 Am. St. Rep. 320, 91 N. W. 940; *McGee v. Wilson*, Litt. Sel. Cas. 187; *Goodrich v. Davis*, 11 Met. 473; *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251; *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624; *Barber v. St. Louis Dispatch Co.*, 3 Mo. App.

377; *Gates v. New York Recorder Co.*, 155 N. Y. 228, 49 N. E. 769; *Collins v. Dispatch Pub. Co.*, 152 Pa. 187, 34 Am. St. Rep. 636, 25 Atl. 546; *Lowe v. Herald Co.*, 6 Utah, 175, 21 Pac. 991; *Wilcox v. Moon*, 63 Vt. 481, 22 Atl. 80.

Publications to the effect that a person has been expelled from his church by reason of his unworthy character and improper conduct are libelous per se: *Call v. Larabee*, 60 Iowa, 212, 14 N. W. 237; *McCorkle v. Buins*, 5 Binn. 340, 6 Am. Dec. 420. Likewise, a publication which charges a number of women with contracted fanaticism and conduct by which they brazenly lowered themselves to a level which they would blush, if they possessed modesty, to see described in type, and that they are usually indifferently good mothers, wives and daughters, has been held to be libelous per se: *Street v. Johnson*, 80 Wis. 344, 27 Am. St. Rep. 42, 50 N. W. 395, 14 L. R. A. 203.

It is also libelous per se to charge a person with having acted in an outrageous dishonest manner or with having violated matters of trust or betrayed the confidences of his friends: *Patton v. Cruce*, 72 Ark. 421, 105 Am. St. Rep. 46, 81 S. W. 380; *Stewart v. Pierce*, 93 Iowa, 136, 61 N. W. 388; *Mosuat v. Snyder*, 105 Iowa, 500, 75 N. W. 356; *McDuff v. Detroit Evening Journal Co.*, 84 Mich. 1, 22 Am. St. Rep. 673, 47 N. W. 671; *Manget v. O'Neill*, 51 Mo. App. 35; *Lander v. Jones*, 13 N. Dak. 525, 101 N. W. 907.

Likewise, it is libelous per se to charge a person with being a bastard or to publish of a white man that he is a negro: *Shelby v. Sun Printing etc. Assn.*, 38 Hun, 474; *Upton v. Times-Democrat Pub. Co.*, 104 La. 141, 28 South. 970; *Flood v. Evening Post Pub. Co.*, 71 S. C. 122, 50 S. E. 641. And a publication stating that plaintiff is "a cowardly snail that shrinks back into his shell at the sight of the slightest shadow" is libelous per se: *Price v. Whitley*, 50 Mo. 439. A written publication characterizing one as a "disreputable person," and charging him with having maliciously published in a newspaper a known false report tending to injure the credit of the city in which he lives is libelous per se unless privileged or justified: *Trebby v. Transcript Pub. Co.*, 74 Minn. 84, 73 Am. St. Rep. 83, 76 N. W. 961. Hence, it is libelous per se to charge one with being a hypocrite or a "hypocritical puppy": *Jones v. Greeley*, 25 Fla. 629, 6 South. 448; *State v. Mayberry*, 33 Kan. 441, 6 Pac. 553; *Knox v. Meehan*, 64 Minn. 280, 66 N. W. 1149; *Byram v. Aik*, 65 Minn. 87, 67 N. W. 807; *Finch v. Vifquain*, 11 Neb. 280, 9 N. W. 43; or a rascal: *Cassidy v. Brooklyn Daily Eagle*, 18 N. Y. Supp. 930; *Williams v. Karnes*, 4 Humph. 9; *Snowden v. Lindo*, 1 Cranch C. C. 569, Fed. Cas. No. 13,152; or a scoundrel: *Davis v. Griffith*, 4 Gill & J. 342; *Loveland v. Hosmer*, 8 How. Pr. 215; *Upton v. Hume*, 24 Or. 420, 41 Am. St. Rep. 863, 33 Pac. 810, 21 L. R. A. 493; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; *Van Slyke v. Carpenter*, 7 Wis. 173; *Cook v. Tribune Assn.*, 5 Blatchf. 352, Fed. Cas.

No. 3165; or a confidence man: *Manget v. O'Neill*, 51 Mo. App. 35; or a blackguard: *Croasdale v. Bright*, 6 Houst. 52; *Davis v. Griffith*, 4 Gill & J. 342; or a villain: *Hillhouse v. Dunning*, 6 Conn. 391; *Upton v. Hume*, 24 Or. 420, 41 Am. St. Rep. 863, 33 Pac. 810, 21 L. R. A. 493; or a swindler: *Caudrian v. Miller*, 98 Wis. 164, 73 N. W. 1004. But mere terms of general abuse are not libelous per se unless they impute some disgrace or charge which amounts to a libel: *Rice v. Simmons*, 2 Harr. 417, 31 Am. Dec. 766. Hence, it is not libelous per se to accuse one of being a member of a labor union and a labor agitator: *Wabash R. Co. v. Young*, 162 Ind. 102, 69 N. E. 1003, 4 L. R. A., N. S., 1091.

A written or printed statement published of and concerning another, which is false and tends to injure his reputation, and thereby expose him to public hatred, scorn, obloquy and shame, is libelous per se. Hence, an article in regard to a college professor and author, representing him as egotistical, conceited, illiterate, uncultivated, coarse and vulgar, and his ideas as foolish and sensational, creating the impression that he makes himself ridiculous, both in his method of instruction and his public lectures, and ridiculing his private life by charging that he was unable to select a name for his baby until after a year's solemn deliberation, and holding him up in a general way as a presumptuous literary freak, is libelous per se: *Triggs v. Sun Printing etc. Assn.*, 179 N. Y. 144, 103 Am. St. Rep. 841, 71 N. E. 739, 66 L. R. A. 612.

A publication imputing poverty, squalor and misery may be so phrased as to excite ridicule, and thus become libelous per se: *Battersby v. Collier*, 24 App. Div. 89, 48 N. Y. Supp. 976; *Martin v. Press Pub. Co.*, 93 App. Div. 531, 87 N. Y. Supp. 859. And publications charging men with such conduct or acts with women as tend to render them ludicrous or ridiculous, such as having been jilted on the eve of a prospective wedding, public chastisement by women, and the like, are libelous per se: *Hatt v. Evening News Assn.*, 94 Mich. 114, 53 N. W. 952; *Holston v. Boyle*, 46 Minn. 432, 49 N. W. 203; *Morey v. Morning Journal Assn.*, 123 N. Y. 207, 20 Am. St. Rep. 730, 25 N. E. 161, 9 L. R. A. 621; *Walker v. San Antonio Light Pub. Co.*, 30 Tex. Civ. App. 165, 70 S. W. 555. And the same is true of publications directed against women where such publications charge a woman with unwomanly conduct not amounting to unchastity, or with some sensational conduct of a ludicrous or humiliating character: *Smith v. Smith*, 73 Mich. 445, 16 Am. St. Rep. 594, 41 N. W. 449, 3 L. R. A. 52; *McMurray v. Martin*, 26 Mo. App. 437; *Gates v. New York Recorder Co.*, 155 N. Y. 228, 49 N. E. 769; *Kirman v. Sun Printing etc. Assn.*, 99 App. Div. 307, 91 N. Y. Supp. 193; *McFadden v. Morning Journal Assn.*, 28 App. Div. 508, 51 N. Y. Supp. 275; *Allen v. News Pub. Co.*, 81 Wis. 120, 50 N. W. 1093.

And printed charges of such cruel and inhuman conduct toward either man or beast as will excite the hatred and contempt of the

community are also libelous per se: *Republican Pub. Co. v. Mosman*, 15 Colo. 399, 24 Pac. 1051; *O'Rourke v. Lewiston Daily Sun Pub. Co.*, 89 Me. 810, 36 Atl. 398; *Loker v. Campbell*, 163 Mass. 242, 39 N. E. 1038; *Saunders v. Post-Standard Co.*, 107 App. Div. 84, 94 N. Y. Supp. 993; *Gross Coal Co. v. Rose*, 126 Wis. 24, 110 Am. St. Rep. 894, 105 N. W. 225, 2 L. R. A., N. S., 741.

To publish of an individual that he is a common liar is libelous per se: *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869; *Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. Rep. 510, 78 Pac. 215. In fact a printed publication directly charging the plaintiff with a want of veracity is generally held to be libelous per se: *Lindley v. Horton*, 27 Conn. 58; *Colvard v. Black*, 110 Ga. 642, 36 S. E. 80; *Gabe v. McGinniss*, 68 Ind. 538; *Jensen v. Damm*, 127 Iowa, 555, 103 N. W. 798; *Riley v. Lee*, 88 Ky. 603, 21 Am. St. Rep. 358, 11 S. W. 713; *Sanford v. Rowley*, 93 Mich. 119, 52 N. W. 1119; *Trebby v. Transcript Pub. Co.*, 74 Minn. 84, 73 Am. St. Rep. 330, 76 N. W. 961; *Giles v. John B. Clarke Co.*, 69 N. H. 92, 36 Atl. 876; *Brooks v. Bemis*, 8 Johns. 455; *Rider v. Rulison*, 74 Hun, 239, 26 N. Y. Supp. 234; *Byrd v. Hudson*, 113 N. C. 203, 18 S. E. 209; *McCorkle v. Bemis*, 5 Binn. 340, 6 Am. Dec. 420; *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 455; *Byrne v. Funk*, 38 Wash. 506, 80 Pac. 772; *Monson v. Lathrop*, 96 Wis. 386, 65 Am. St. Rep. 54, 71 N. W. 596.

To charge the publisher of a newspaper with insincerity or the sale of his influence is libelous since it exposes him to "hatred, contempt, ridicule and obloquy" and injures him in his business: *Monographic note to Livingston v. Page*, 93 Am. St. Rep. 907.

In a general way it may be said that a publication imputing insanity to the plaintiff is libelous per se since it not only tends to expose him to contempt and ridicule but injures him in his business: *Perkins v. Mitchell*, 31 Barb. 461; *Seip v. Deshler*, 170 Pa. 334, 32 Atl. 1032. Thus, in *Moore v. Francis*, 121 N. Y. 199, 18 Am. St. Rep. 810, 23 N. E. 1127, 8 L. R. A. 214, the court said: "The authorities tend to support the proposition that spoken words imputing insanity are actionable per se, when spoken of one in his trade or occupation but not otherwise, without proof of special damages: *Morgan v. Lingen*, 8 L. T. 800; *Joanes v. Burt*, 6 Allen, 236, 83 Am. Dec. 625. The imputation of insanity in a written or printed publication is a fortiori libelous, where it would constitute slander if the words were spoken. Written words are libelous in all cases where, if spoken, they would be actionable, but they may be libelous where they would not support an action for oral slander."

In some cases it has been held that to impute to a person that he is an ignorant, weak-minded and shallow person, constitutes a libel per se: *Morse v. Times-Republican Printing Co.*, 124 Iowa. 707, 100 N. W. 867; *Belknap v. Ball*, 83 Mich. 583, 21 Am. St. Rep. 622, 47 N. W. 674, 11 L. R. A. 72; *Wood v. Boyle*, 177 Pa. 620, 55

Am. St. Rep. 747, 25 Atl. 853; Candrian v. Miller, 98 Wis. 164, 73 N. W. 1004.

**b. Where the Words Impute the Commission of a Crime.**—Some confusion exists among the authorities as to the true rule with respect to whether it is libelous per se to charge a person with the commission of a crime. This confusion or uncertainty is, however, only apparent and not real. And in fact there is no reason whatsoever for its existence. It arises merely from the fact that some courts speak of the rules of law applicable to the subject of libels in a loose manner without making it apparent that they realize the distinction which really exists between libel and slander in respect to the making of charges of crime. It also arises from the fact that the courts in libel cases involving this particular subject often go into entertaining and learned discussions of the law of slander in respect to slanderous charges of crime, when in fact such discussion tends rather to cloud than to throw light upon the subject.

The rule supported by the weight of authority is that written words charging a person with a crime are libelous per se whether the crime be a felony or misdemeanor: Ivey v. Pioneer Sav. etc. Co., 113 Ala. 349, 21 South. 531; American Casualty Co. v. Lea, 56 Ark. 539, 20 S. W. 416; Childers v. San Jose Mercury etc. Co., 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903; Dannehy v. O'Connell, 66 Conn. 175, 33 Atl. 920; Montgomery v. Knox, 23 Fla. 595, 3 South. 211; Tillman v. Willis, 61 Ga. 433; Kenney v. Illinois State Journal Co., 64 Ill. App. 39; Tracy v. Hackett, 19 Ind. App. 133, 65 Am. St. Rep. 398, 49 N. E. 185; Lehrer v. Elmore, 100 Ky. 56, 37 S. W. 292; Thompson v. Lewiston Daily Sun Pub. Co., 91 Me. 203, 39 Atl. 556; Richardson v. State, 66 Md. 205, 7 Atl. 43; Worthington v. Houghton, 109 Mass. 481; Haynes v. Clinton Printing Co., 169 Mass. 512, 48 N. E. 275; McAllister v. Detroit Free Press Co., 76 Mich. 338, 15 Am. St. Rep. 318, 43 N. W. 431; Boehmer v. Detroit Free Press Co., 94 Mich. 7, 34 Am. St. Rep. 318, 53 N. W. 822; Simmons v. Holster, 13 Minn. 249; Davis v. Hamilton, 85 Minn. 209, 88 N. W. 744; Ferguson v. Evening Chronicle Pub. Co., 72 Mo. App. 462; Jones v. Murray, 167 Mo. 25, 66 S. W. 981; World Pub. Co. v. Mullin, 43 Neb. 126, 47 Am. St. Rep. 737, 61 N. W. 108; Palmer v. Concord, 48 N. H. 211, 97 Am. Dec. 605; Barnes v. Campbell, 59 N. H. 128, 47 Am. Rep. 183; Hoboken Printing etc. Co. v. Kahn, 59 N. J. L. 218, 59 Am. St. Rep. 585, 35 Atl. 1053; Hartkorn v. Paterson etc. Co., 57 N. J. L. 42, 50 Atl. 354; Hotchkiss v. Oliphant, 2 Hill, 510; Stillwell v. Barter, 19 Wend. 487; Turton v. New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009; Ramsey v. Cheek, 109 N. C. 270, 13 S. E. 775; Cincinnati Gazette Co. v. Timberlake, 10 Ohio St. 548, 78 Am. Dec. 285; Upton v. Hume, 24 Or. 420, 41 Am. St. Rep. 863, 33 Pac. 810, 21 L. R. A. 493; Conroy v. Pittsburgh Times, 139 Pa. 334, 23 Am. St. Rep. 188, 21 Atl. 154, 11 L. R. A. 725; Bryant v.

Pittsburgh Times, 192 Pa. 585, 44 Atl. 251; *Perry v. Man*, 1 R. I. 263; *Tillinghast v. McLeod*, 17 R. I. 208, 21 Atl. 345; *Milam v. Burnside*, 1 Brev. 295; *Larkins v. Tarter*, 3 Sneed, 681; *Haws v. Stanford*, 4 Sneed, 520; *Belo v. Fuller*, 84 Tex. 450, 31 Am. St. Rep. 75, 19 S. W. 616; *Lowe v. Herold Co.*, 6 Utah, 175, 21 Pac. 901; *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757; *Kraus v. Sentinel Co.*, 60 Wis. 425, 19 N. W. 384; *In re McDonald*, 4 Wyo. 150, 33 Pac. 18.

It is true that written words are libelous where the same words would be slanderous if uttered orally: *Moore v. Francis*, 121 N. Y. 199, 18 Am. St. Rep. 810, 23 N. E. 1127, 8 L. R. A. 214; *Watson v. Trask*, 6 Ohio, 531, 27 Am. Dec. 271. Hence, it follows that in many cases words which are libelous per se would also be slanderous per se if they were uttered orally, because they are such words as come within the rule which obtains in respect to oral words charging crimes, namely, the rule announced in the leading case of *Brooker v. Coffin*, 5 Johns. 188, 4 Am. Dec. 337, wherein the court said: "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude or subject him to an infamous punishment, then the words will be in themselves actionable."

There is, of course, considerable difficulty in determining when oral words charging crimes are slanderous under the above rule, but that difficulty does not apply to words when written. In other words, oral words charging a crime, such as assault and battery or the like, may not be slanderous per se because the crime charged does not involve moral turpitude, or an infamous punishment, whereas the same words if written would be libelous per se.

**c. Where the Words Merely Impute a Criminal Intention or Disposition.**—The court in *Prewitt v. Wilson*, 128 Iowa, 198, 103 N. W. 365, in holding that a written publication stating that the writers were well acquainted with the plaintiff and would not believe him under oath, was libelous per se, said: "It is true that, ordinarily, oral words which impute to another a criminal disposition or charge him with being notoriously untruthful or unworthy of the respect and confidence of his neighbors are not actionable, but such imputations, written and published, are universally held to constitute a libel per se. Applying the accepted definition of libel, it is difficult to conceive of any publication more likely to provoke the victim to wrath or expose him to public hatred and distrust, or to deprive him of the benefits of public confidence, than to publish abroad that he is a common liar whose word, even under the solemnity of an oath, will not be believed by his acquaintances. This rule is not to be evaded by the plea that the publisher of the defamatory words did no more than to express his personal belief."

**d. Where the Words Impute Political Corruption or Unfitness for Office to Persons in or out of Office.**—Written words charging as

official with acts amounting to a crime are naturally libelous per se: *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216; *Star Pub. Co. v. Donohoe* (Del.), 58 Atl. 513, 65 L. R. A. 980; *Atlanta News Pub. Co. v. Medlock*, 123 Ga. 714, 51 S. E. 756, 3 L. R. A., N. S., 1139; *Boehmer v. Detroit Free Press Co.*, 94 Mich. 7, 34 Am. St. Rep. 318, 53 N. W. 822; *Weston v. Grand Rapids Pub. Co.*, 128 Mich. 375, 87 N. W. 258; *Lindsey v. Smith*, 7 Johns. 359; *Wooley v. Plaindealer Pub. Co.*, 47 Or. 619, 84 Pac. 473, 5 L. R. A., N. S., 498; *Tiepke v. Times Pub. Co.*, 20 B. I. 200, 37 Atl. 1031; *Cotulla v. Kerr*, 74 Tex. 89, 15 Am. St. Rep. 819, 11 S. W. 1058; *Chipman v. Cook*, 2 Tyler, 456. See, also, subdivision VIII, b. But it is not necessary that the written words derogatory to the official impute the commission of a crime in order to make them libelous per se: *Sillars v. Collier*, 151 Mass. 50, 23 N. E. 723, 6 L. R. A. 680; *Gove v. Blethen*, 21 Minn. 80, 18 Am. Rep. 380. In fact any written statements imputing to an officer want of integrity or lack of those qualities which are necessary for the proper performance of the duties of his office or a failure to properly perform the duties of his office are libelous per se, since it may be said that such statements tend to make his tenure of office less secure and thus injure his business or occupation: *Wafford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66, 30 South. 625, 55 L. R. A. 214; *Rea v. Wood*, 105 Cal. 314, 38 Pac. 899; *Byers v. Martin*, 2 Colo. 605, 25 Am. Rep. 755; *Prussing v. Jackson*, 85 Ill. App. 324; *Prosser v. Callis*, 117 Ind. 105, 19 N. E. 735; *Robbins v. Treadway*, 2 J. J. Marsh. 540, 19 Am. Dec. 152; *Evening Post Co. v. Richardson*, 113 Ky. 641, 68 S. W. 665; *Kilgour v. Evening Star etc. Co.*, 96 Md. 16, 53 Atl. 716; *Sillars v. Collier*, 151 Mass. 50, 23 N. E. 723, 6 L. R. A. 680; *Bowereseau v. Detroit Evening etc. Co.*, 63 Mich. 425, 6 Am. St. Rep. 320, 30 N. W. 376; *Larrabee v. Minnesota Tribune Co.*, 36 Minn. 141, 30 N. W. 462; *Thompson v. Powning*, 15 Nev. 195; *Heller v. Duff*, 62 N. J. L. 101, 40 Atl. 691; *Oakley v. Farrington*, 1 Johns. Cas. 129, 1 Am. Dec. 107; *Van Tassel v. Capron*, 1 Denio, 250, 43 Am. Dec. 667; *O'Leary v. New York News Pub. Co.*, 51 App. Div. 2, 64 N. Y. Supp. 327; *Dawson v. Baxter*, 131 N. C. 65, 42 S. E. 456; *Hook v. Hackney*, 16 Serg. & R. 385; *Cotulla v. Kerr*, 74 Tex. 89, 15 Am. St. Rep. 819, 11 S. W. 1058; *Moss v. Harwood*, 102 Va. 386, 46 S. E. 385; *Lansing v. Carpenter*, 9 Wis. 540, 76 Am. Dec. 281; *Smith v. Utley*, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620.

And charges against citizen who does not hold office, to the effect that such citizen is about to carry an election by corrupt means or that a citizen, who is an influential politician has taken large sums of money for appointments to political offices, are also libelous per se: *Tillson v. Robinson*, 68 Me. 295, 28 Am. Rep. 50; *Field v. Magee*, 122 Mich. 556, 81 N. W. 354; *Hand v. Winton*, 38 N. J. L. 122; *Weed v. Foster*, 11 Barb. 203.

**e. Where the Words Impute a Lack of Knowledge, Skill or Integrity in Plaintiffs in Regard to His Business, Occupation or Profession.**

1. **In General.**—Words which are written concerning a person in his business, occupation or profession and which impute to him a lack of knowledge, skill or integrity in such business, occupation or profession, and which thereby tend to injure him therein are libelous per se, even though they would not be actionable per se if spoken or written of one not engaged in such business, occupation or profession: *Gaudy v. Humphries*, 35 Ala. 617; *Obaugh v. Finn*, 4 Ark. 110, 37 Am. Dec. 773; *Swan v. Thompson*, 124 Cal. 193, 56 Pac. 878; *McKinzie v. Denver Times Pub. Co.*, 3 Colo. App. 554, 34 Pac. 577; *Wynne v. Parsons*, 57 Conn. 73, 17 Atl. 362; *Mitchell v. Milholland*, 106 Ill. 175; *Hardy v. Williamson*, 86 Ga. 551, 22 Am. St. Rep. 479, 12 S. E. 874; *Craig v. Brown*, 5 Blatchf. 44; *Doan v. Kelley*, 121 Ind. 413, 23 N. E. 266; *Mosuat v. Snyder*, 105 Iowa, 500, 75 N. W. 356; *Feed v. Traylor*, 115 Ky. 94, 72 S. W. 768; *Mielly v. Soule*, 49 La. Ann. 800, 21 South. 593; *Orr v. Skofield*, 56 Me. 483; *Wilson v. Cottman*, 65 Md. 190, 3 Atl. 890; *Morasae v. Brochu*, 151 Mass. 567, 21 Am. St. Rep. 474, 25 N. E. 14, 8 L. R. A. 524; *Dallavo v. Snider*, 143 Mich. 542, 114 Am. St. Rep. 684, 107 N. W. 271, 4 L. R. A., N. S., 973; *Williams v. Davenport*, 42 Minn. 333, 18 Am. St. Rep. 519, 44 N. W. 311; *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 38 Am. St. Rep. 592, 22 S. W. 358, 724, 20 L. R. A. 138; *St. James Military Academy v. Gaiser*, 125 Mo. 517, 46 Am. St. Rep. 502, 28 S. W. 851, 28 L. R. A. 667; *Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215; *Piper v. Woolman*, 43 Neb. 280, 61 N. W. 588; *Johnson v. Shields*, 25 N. J. L. 116; *Cruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. 457; *Moore v. Francis*, 121 N. Y. 199, 18 Am. St. Rep. 810, 23 N. E. 1127, 8 L. R. A. 114; *Krug v. Pitass*, 162 N. Y. 154, 76 Am. St. Rep. 317, 56 N. E. 526; *Triggs v. Sun Printing etc. Assn.*, 179 N. Y. 144, 103 Am. St. Rep. 841, 71 N. E. 739, 66 L. R. A. 612; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303; *Price v. Conway*, 134 Pa. 340, 19 Am. St. Rep. 704, 19 Atl. 697, 8 L. R. A. 193; *Davis v. Davis*, 1 Nott. & M. 290; *Fry v. McCord*, 95 Tenn. 678, 33 S. W. 568; *Cooley v. Galyon*, 109 Tena. 1, 97 Am. St. Rep. 823, 70 S. W. 607, 61 L. R. A. 914; *Hirshfield v. Ft. Worth*; *Jones v. Roberts*, 73 Vt. 201, 50 Atl. 1071; *Moore v. Rolin*, 89 Va. 187, 15 S. E. 520, 16 L. R. A. 625; *Monson v. Lathrop*, 96 Wis. 386, 65 Am. St. E. 520, 16 L. R. A. 625; *Monson v. Lathrop*, 96 Wis. 386, 65 Am. St. Rep. 54, 71 N. W. 596; *Daily v. De Young*, 127 Fed. 491; *Harmar v. Delany*, 2 Strange, 898; *Jenner v. D'Eeckett*, L. R. 7 Q. B. 11.

2. **Effect Where the Business or Occupation is an Unlawful One or Conducted Without a Proper License.**—Where plaintiff's business or occupation is an illegal one, or where he requires a license in order to conduct it and has not procured such license, he cannot maintain an action for alleged libelous statements made in respect to such



illegal or unlicensed business or occupation: *Johnson v. Simonton*, 43 Cal. 242; *Hargan v. Purdy*, 93 Ky. 424, 20 S. W. 432; *Dauphin v. Times Pub. Co.*, Fed. Cas. No. 3584a; *Hunt v. Bell*, 1 Bing. 1; *Yrisari v. Clement*, 3 Bing. 482, 2 Car. & P. 223.

But the fact that one is engaged in an unlawful occupation does not make language concerning him as an individual or in some other lawful occupation less libelous: *Chenery v. Goodrich*, 98 Mass. 224.

3. **Distinction Between Statements Concerning a Person Individually and in a Business Capacity.**—In order for words not ordinarily actionable in themselves to be libelous per se because affecting the plaintiff in respect to his business, occupation or profession, it is necessary that the words have a reference to him in that capacity: *Morasae v. Brochn*, 151 Mass. 567, 21 Am. St. Rep. 474, 25 N. E. 74, 8 L. R. A. 524. It is, however, sufficient if the words tend to injure him in such capacity, even though they make no specific reference to his business, occupation or profession, but they are not actionable where they would be equally injurious to anyone of whom they were published and yet do not come within the general rule of libelous statements: *Sanderson v. Caldwell*, 45 N. Y. 398, 6 Am. Rep. 105. Thus in the principal case it was held that it was not libelous per se to write and publish of one not a trader or merchant and not of or concerning his business or affairs that he is indebted to another, and though able to pay, has neglected or refused to do so: *Nichols v. Daily Reporter Co.*, 30 Utah, 74, ante, p. 796, 83 Pac. 573, 3 L. R. A., N. S., 339.

1. **Where the Words Impute Want of Credit, Insolvency or Failure to Pay Debts Promptly.**—Words which impute to persons engaged in business, such as merchants, traders and others, in occupations where credit is essential to the successful prosecution of their occupation, nonpayment of debts, want of credit, insolvency or actions which tend to lessen their credit, are libelous per se unless they are privileged communications: *Ingraham v. Lyon*, 105 Cal. 254, 38 Pac. 892; *McKenzie v. Denver Times Pub. Co.*, 3 Colo. App. 554, 34 Pac. 577; *Lewis v. Hawly*, 2 Day, 495, 2 Am. Dec. 121; *Johnson v. Bradstreet Co.*, 77 Ga. 172, 4 Am. St. Rep. 77; *Brown v. Holton*, 109 Ga. 431, 34 S. E. 717; *White v. Parks*, 93 Ga. 633, 20 S. E. 78; *Hays v. Mather*, 15 Ill. App. 30; *Werner v. Vogeli*, 10 Kan. App. 536, 63 Pac. 607; *Hartnett v. Plumber Supply Assn.*, 16 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194; *Simons v. Burnham*, 102 Mich. 189, 60 N. W. 476; *Woodling v. Knickerbocker*, 31 Minn. 268, 17 N. W. 387; *Traynor v. Sieloff*, 62 Minn. 420, 64 N. W. 915; *McDermott v. Union Credit Co.*, 76 Minn. 84, 78 N. W. 967, 79 N. W. 673; *Herman v. Bradstreet Co.*, 19 Mo. App. 227; *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 38 Am. St. Rep. 592, 22 S. W. 358, 724, 20 L. R. A. 138; *Bee Pub. Co. v. World Pub. Co.*, 59 Neb. 713, 82 N. W. 28; *Sewall v. Catlin*, 3 Wend. 291; *Mott v. Comstock*, 7 Cow. 654; *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701; *Hayes v. Press Co.*, 127 Pa. 642, 14 Am. St. Rep. 874, 18 Atl. 331, 5

L. R. A. 643; McIntyre v. Weinert, 195 Pa. 52, 45 Atl. 666; Reynolds v. Bently, 1 McMull. 16, 36 Am. Dec. 251; Continental Nat. Bank v. Bowdre, 92 Tenn. 723, 23 S. W. 131; Burton v. O'Niell, 6 Tex. Civ. 613, 25 S. W. 1013; Hirschfield v. Ft. Worth Nat. Bank, 83 Tex. 452, 29 Am. St. Rep. 660, 18 S. W. 143, 15 L. R. A. 639; Nichols v. Daily Reporter Co., 30 Utah, 74, ante, p. 796, 83 Pac. 573, 3 L. R. A., N. S., 339; Darling v. Clement, 69 Vt. 292, 37 Atl. 779; Brown v. Varman, 85 Wis. 451, 39 Am. St. Rep. 860, 55 N. W. 183; Robinson v. Eau Claire Book etc. Co., 110 Wis. 369, 85 N. W. 983; Solomon v. Armour & Co., 123 Fed. 342.

## LARKIN v. SALTAIR BEACH COMPANY.

[30 Utah, 86, 83 Pac. 686.]

**JUDGES—Termination of Term—Signing Bill of Exceptions After.**—A judge may settle and sign a bill of exceptions after his term of office expires in a case tried by him while holding the office, and such act is not in conflict with a constitutional provision, limiting the term of office of such judge to a specified number of years. (p. 824.)

**WITNESSES—Cross-examination.**—If, in an action against the keeper of a bathing resort to recover for the wrongful death of a bather therein, a witness testifies on direct examination, that he is and for many years has been, familiar with such bathing resort, that he had been there hundreds of times in storms, that he had some experience, that he had not seen much danger and did not know that the bathing resort was very perilous, the opposing party is entitled to cross-examine him fully with reference to his prior statements and acts tending to show that to his certain knowledge such bathing resort was dangerous. (p. 826.)

**WITNESSES—Impeachment.**—Evidence is admissible tending to show that a witness has, on former occasions, made statements contradictory to and inconsistent with his testimony given at the trial, which statements he has denied making, his attention on cross-examination having first been specifically invited to the time, place and circumstance of each conversation in which it is claimed such statements were made. Such testimony is admissible for the purpose of impeaching such witness. (p. 827.)

**AMUSEMENT RESORTS—Liability of Keeper of.**—Owners or proprietors of amusement resorts to which people generally are expressly or by implication invited to come are legally bound to exercise ordinary care and prudence in the maintenance and management of such resorts to the end of making them reasonably safe for visitors. (p. 828.)

**AMUSEMENT PLACES—Bathing Resorts—Liability of Proprietor of.**—The proprietor or owner of a bathing resort is not only required to exercise ordinary care and prudence with respect to keeping the premises in a reasonably safe condition, but the law also imposes upon him the additional duty, where the character and condi-

tions of the resort are such that because of deep water or the arising of sudden storms, or other causes, the bathers may get into danger, of having in attendance some suitable person with the necessary appliances to effect rescues and save those who may meet with an accident. (p. 828.)

**AMUSEMENT PLACES—Bathing Resorts—Liability and Duty of Owner of.**—Not only is it the duty of owners of bathing resorts to be prepared to rescue those who may get into danger while in bathing, but it is also their duty to act with promptness, and make every reasonable effort to search for, and if possible, rescue those who are known to be missing. (pp. 828, 829.)

**AMUSEMENT PLACES—Bathing Resorts—Liability of Owner—Negligence.**—An owner or proprietor of a bathing resort to which the public is invited, who maintains no notices indicating the depth of the water or other danger signals, nor any means for the rescue of bathers, and who, on being notified that a bather is in deep water and in danger of drowning and is missing, sends no one to search for him or give him relief, and does not try in any way to rescue him until several hours after such notice is given him, is guilty of negligence warranting a recovery for the death of such bather, especially when the latter is not guilty of contributory negligence. (p. 830.)

Richards, Richards & Ferry, for the appellant.

C. S. Price, W. M. McCrea and W. H. King, for the respondent.

90 McCARTY, J. This action was brought by plaintiff, Anna M. Larkin, to recover damages for the death of her son, Roy E. Larkin, alleged to have been drowned in the waters of Great Salt Lake at the bathing resort of the defendant. The negligence complained of is that the defendant failed to provide suitable guards or life lines, or to establish or erect notices indicating the depth of the water in and about said beach, or to provide suitable and proper persons to superintend bathing in said waters, or to provide persons or appliances to rescue bathers from drowning when in danger, or to provide a person or persons and to have such person or persons present on behalf of said defendant to search for and recover any of its bathers, bathing in said waters, when in danger, and that in consequence thereof the said Roy E. Larkin was drowned while bathing in said waters. The defendant answered, denying the allegations of the plaintiff's complaint charging negligence, and alleged contributory negligence on the part of Roy E. Larkin.

The facts in the case, as disclosed by the evidence, are about as follows: During the summer season of 1903 the defendant conducted a bathing resort known as "Saltair Beach," situated on the east bank of the Great Salt Lake, a distance of

about fourteen miles from Salt Lake City. It is admitted the defendant generally invited the public to accept the facilities for bathing at said resort for hire. The resort consisted of a large pavilion and bathrooms erected on piling set out some distance in the lake. The bathrooms commenced at the pavilion, and extended about seven hundred feet in a northwesterly direction into the lake. There was no water under the pavilion itself, and none for some distance out to the west. At the point where the bathhouses ended the water was about six inches deep, and the bathers were usually conveyed from this point by means of a raft operated by the defendant to a pulley frame or "float stand" about one thousand <sup>91</sup> feet out in the lake from the bathhouses, and at a point where the water was about three and one-half feet in depth, and three hundred feet farther out in the lake, in a westerly and northwesterly direction, the water was five and one-half feet deep. The plaintiff at the time of the suit had been a resident of Salt Lake City for seven years and was without means of support other than the assistance of her three children. The eldest, aged twenty years, was in poor health; Roy, the deceased, was fourteen years old; and the youngest was eight years of age. Roy was kind and obedient to his mother, and was a boy of good habits. For three years he had been employed, and had given his earnings or wages of five dollars per week to his mother. On July 23, 1903, plaintiff and deceased, in company with several of their friends, went to Saltair Beach, leaving Salt Lake City about 2:20 o'clock in the afternoon, and arriving at the resort at about 2:55 P. M. Soon after they reached defendant's pavilion the deceased and two other members of the party, Ross Wells and Miss Pomeroy, purchased bathing tickets, each paying therefor the sum of twenty-five cents. They thereupon went to the bathrooms provided by defendant and proceeded to bathe in the waters of defendant's resort. They waded out through the shallow water from the end of the pier or bathrooms parallel with the cable to the float stand, and when the party had reached that point they lay down in the water and proceeded to float, forming what the witnesses call a "chain." Ross Wells, who was a good swimmer and who had frequently bathed at defendant's resort, was in the lead, and supported deceased by his feet, which were placed under the arms of the latter. Miss Pomeroy, who was also able to swim and was

familiar with the resort, followed with the feet of deceased under her arms. Roy Larkin, the deceased, could not swim, and had never been in bathing at defendant's resort before. There were about fifty or sixty people bathing in the vicinity of the float stand when the party arrived there. When the deceased and his associates commenced bathing a slight breeze was blowing, and they gradually floated out into the lake into deeper water. There were no notices indicating the depth of the water or other danger signals in the lake. Ross Wells testified that when about one hundred and eighty-five feet northwest from the float stand (and within the radius of where the patrons of defendant's resort usually bathed), the wind had increased in velocity <sup>92</sup> and was blowing offshore; that he tried to put his feet on the bottom or bed of the lake, but because of the depth of the water was unable to do so; that he then suggested to his companions—the deceased and Miss Pomeroy—that they again form the chain and start back for the pavilion; that in attempting to reform the chain Miss Pomeroy was quite badly strangled, the water being heavily impregnated with salt, and soon after the deceased was struck in the face by a wave, and he also was partially strangled; that they finally reformed the chain, endeavored to return to the pavilion, but, in spite of their efforts, the high wind carried them out farther into the lake; that when he (Wells) found they were losing ground he made signals, and called to two men who were bathing in that vicinity for help; that the parties (presumably not understanding the meaning of the signals or his call for help) waved their hands to him in reply, and paid no further attention to his cry of distress; that it was finally agreed that Miss Pomeroy should try and make her own way back to the pavilion and notify the people of the danger that Wells and Larkin were in. The evidence also shows that Miss Pomeroy, after a severe struggle of about an hour and a half, arrived at the pavilion in an exhausted condition. Larkin, being unable to swim or float without assistance, Wells, with the double weight, was unable to make any headway toward the pavilion, and he and his companion were gradually carried out farther into the lake by the wind, which was rising and increasing in velocity, making the water very rough. Darkness came on, and the lights at the pavilion went out, and the boys were carried by the wind and waves over in the vicinity of a large island in the lake known

as "Antelope Island," which is about six miles from the pavilion at defendant's resort. Wells let himself down many times in attempts to reach the bottom, but because of the depth of the water was unable to do so. He continued to float and keep himself and Larkin on the surface of the water until about 3 or 4 o'clock that night, when he became exhausted, his lower limbs were seized with cramps, and he was unable to longer continue the struggle. He gave some instructions to Roy Larkin, whom he had been supporting all this time, respecting the position in which he, Larkin, should keep his body in order to float and drift with the waves, with the hope that Larkin might be driven ashore alive. At this junction Wells gave up in despair, and Larkin<sup>93</sup> drifted away from him. Immediately after they parted Wells touched bottom, showing that they, without realizing it, had drifted into shallow water. When Wells discovered that he could touch bottom he looked in the direction of Larkin, who had, in the meantime turned over and was out of his reach. About this time Wells, so he testified, became unconscious, and when he regained consciousness the sun was shining and he was lying on the shore of Antelope Island with his feet and legs extending into the water of the lake. He was soon thereafter found by a searching party and taken to the pavilion. A few days thereafter Roy Larkin was found dead on the shore of the same island, his body lying at the water's edge. Ross Wells testified that while he did not anticipate danger by floating out into the lake, yet, had he known the depth of the water at the point where he discovered it was over his head, one hundred and eighty-five feet away from the raft, he would not have gone there that day. There is but little, if any, conflict in the testimony respecting the foregoing facts.

The evidence introduced by the plaintiff tends to show that when Miss Pomeroy returned to the pavilion she at once informed plaintiff and the mother of Ross Wells of the danger the boys were in; that plaintiff, immediately upon receiving the information, dispatched a man with a boat to look for the boys; that the party thus sent went out to a gasoline launch which was anchored about three or four hundred feet out in the lake beyond the float stand, got upon it, and, not seeing the boys, returned to the pavilion; that in the meantime plaintiff and the mother of Ross Wells hunted up the manager of the resort and informed him of the situation the boys were in, as reported by Miss Pomeroy, and requested him to

send a man with a boat to rescue them; that the manager stated to them that there were no seaworthy boats at the resort, and tried to persuade them that their boys were not in danger; that thereupon plaintiff returned to the pier, and when the party returned who had been sent to look for the boys she again sent him out to resume the search; that no attempt was made by the manager of defendant's resort to rescue Ross Wells and his companion, the deceased, until after dark, although they were repeatedly requested so to do by the plaintiff and the mother of Ross Wells. One F. D. Halm was called as a witness by plaintiff, and testified that he was at Saltair Beach on the day in question and learned through a <sup>94</sup> relative of Mrs. Wells that the boys were lost, and that in pursuance of this information he went to the manager an hour or more before sundown and informed him of the danger they were in and asked the manager to give the matter some attention. The testimony of plaintiff's witnesses respecting the time the manager of the resort was informed of the danger the boys were in, and the alleged indifference and neglect on his part in sending out a searching party, was denied by the manager, who was called and testified on the part of defendant.

The issues of fact were submitted to a jury, who returned a verdict for plaintiff, and assessed her damages at six thousand five hundred dollars. To reverse the judgment entered on the verdict the defendant prosecutes this appeal.

Respondent has filed in this court a motion to strike from the files in the case the bill of exceptions. It is claimed that no proper bill of exceptions was ever settled, for the reason that the bill of exceptions was signed and settled on the second day of March, 1905, by Honorable Samuel W. Stewart, judge of the district court, before whom said cause was tried, and that on said second day of March, 1905, he was no longer judge of said district court, his term of office having expired before that date, and that therefore he was without authority to settle and sign the bill. Section 3290 of the Revised Statutes of Utah of 1898, among other things, provides that: "A judge, referee, or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge, referee or judicial officer."

But counsel for respondent contend that this provision of the statutes is in contravention of section 5, article 8 of the

constitution of Utah, which, so far as material here, provides that, "The term of office of the district judges shall be for four years," and that the effect of the provisions of the statute referred to is to extend the judicial functions of a judge of the district court beyond the period of his constitutional term of office. This question has been before the courts of other states, and while some of the decisions hold that a judge has no power to settle and sign a bill of exceptions <sup>25</sup> after the expiration of his term of office, we think the weight of authority and the better reasoning is in favor of the doctrine which holds that a judge who has tried a case may settle and sign a bill of exceptions after he ceases to hold the office. The reason for the rule is apparent. The bill recites the exceptions taken and is a narrative of what occurred at the trial, and the judge who tries a case and is familiar with all of the proceedings is better able to settle a bill of exceptions and thereby preserve to the parties to the action their substantial rights than would be his successor, who might have no personal knowledge of what occurred at the trial. The constitution of Colorado and that of Wyoming have provisions similar to that of our own state limiting the term of office of district judges to a specified number of years, and the courts of those states have held that a district judge may settle a bill of exceptions after his term of office expires in cases tried before him while holding the office. *Stirling v. Wagner*, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128, is a well-considered case, in which the authorities are reviewed at length, and, in the course of the opinion, the court, speaking through Chief Justice Groesbeck, observes: "The bill merely recites what occurred at the trial which is not of record, and is a mere narrative or historical account of those events. In some states, by consent of the parties, the clerk of the court may sign the bill; in others, where the judge is dead or disabled, two attorneys may allow and sign; while in others, in case of grave disputes, the bill may be settled by the testimony of bystanders or members of the bar. . . . When allowing a bill, the court does not pronounce a judgment; it merely states that the exceptions taken in the bill actually occurred during the progress of the trial."

The supreme court of Colorado, in the case of *Water Supply Co. v. Tenney*, 21 Colo. 284, 40 Pac. 442, after referring to the conflict of authorities on this question and citing a



number of decisions from the states which have adopted and adhere to the contrary rule, cite, with approval, the case of *Stirling v. Wagner*, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128, as well as decisions from other states which uphold and declare the same doctrine therein announced, saying: "We think those authorities which recognize the power of the judge to settle a bill after he ceases to hold the office are grounded upon the better reason, and that the rule is more consonant with the liberal <sup>or</sup> spirit of the code in observing the substantial rights of the parties to an action and disregarding technicalities. It saves expense to litigants, and avoids waste of time, yet preserves to the parties their substantial rights equally as well as does either of the methods."

The settling and signing a bill of exceptions being purely a matter of procedure, we have no hesitancy in holding that the legislature may, by statute, regulate such procedure, and especially in view of the fact that there is no constitutional provision which either limits or prohibits such legislation.

Section 9, article 8 of the constitution of Utah, provides in part as follows: "From all final judgments of the district courts there shall be a right of appeal to the supreme court. The appeal shall be upon the record made in the court below, and under such regulations as may be provided by law."

It will thus be seen that the legislature is not only not prohibited from prescribing rules and regulations governing the appellate procedure in this state, but is expressly authorized to "provide by law" how appeals shall be taken. And the settlement of a bill of exceptions by a district judge in certain cases after the expiration of his term of office is one of the "regulations provided by law." The motion to strike the bill of exceptions from the files is therefore overruled.

David L. Davis, one of defendant's witnesses, on direct examination, testified that he was, and had been for many years, familiar with the waters comprising defendant's resort; that "the first few hundred feet of the bottom of the lake is nearly dead flat, and then beyond that the pitch is a little more; a gradual pitch. There are no jump-offs; just about as gradual as you can make it. I never found any holes; never observed anything of that sort. It is impossible to have a hole remain long, for the sand would fill it up. That is my observation. . . . Have been in storms there hundreds of times. I have had some experience. I do not know that

it has been very perilous. I have not seen much danger. It [the wind] does not produce any perceptible change upon the bottom of the lake."

On cross-examination he testified in part as follows: "It is . . . possible that I said that Mrs. Larkin said, 'Is the lake dangerous?' and I said in reply to her, 'Yes, it is dangerous, and particularly in a storm.'

"Q. And then didn't you say that, 'It is a dangerous place there, because there are holes and bars, and the water gets <sup>97</sup> deep in places, and there are no nettings or guard lines, and I have had time and again to bring in people with my gasoline launch, and the company hasn't as much as paid for a gallon of gasoline for me'? A. I don't remember saying a thing like that. I did not mention this part that I had always picked up bathers there because it was dangerous.

"Q. Did you not state at that time and place [referring to a conversation between witness and one M. P. Wells] that as a result, that is, of the sands shifting and bars being formed from one to two feet and a half in twenty-four hours, making holes, and by reason of the rough water and the waves, bathers at Saltair got into danger, and that you and your son had picked up between thirteen and fifteen persons? [This question was objected to as irrelevant, immaterial, and incompetent. Objection overruled.] A. No. I didn't make any statement just that way. Part of it would be like that. I will explain that, owing to the shifting of the current in an offshore wind many bathers got into danger on account of being drifted out, and that my son picked up many that were in apparent danger. The shifting sands would not be included in my statement."

Witnesses were called and testified in rebuttal, over the objections of defendant, to having heard the witness Davis make the statements to which his attention was called by the foregoing examination and which were denied by him. The action of the court in overruling the objections interposed to this testimony is now assigned as error. Davis, having testified on his direct examination that he was familiar with the lake, that he had been there hundreds of times in storms, that he had had some experience, that he had not seen much danger, and did not know that it (his experience on the lake) was very perilous, plaintiff had a right to cross-examine him fully on this branch of the case. This testimony tended to

show that the part of the lake comprising defendant's bathing resort was practically free from danger to its patrons who bathed therein, and was evidently introduced for that purpose, and also for the purpose of neutralizing and overcoming the effect, if any, produced on the minds of the jury by the evidence introduced by plaintiff which tended to show that at times, and under conditions as they existed at the lake when the unfortunate circumstance under consideration occurred, bathing in the waters of the <sup>98</sup> resort is dangerous, and extremely so to those who happen to get into deep water. We are therefore clearly of the opinion that, in view of the testimony given by this witness in his direct examination, the cross-examination referred to was not carried beyond the scope which the authorities uniformly hold may be taken in the cross-examination of witnesses generally. Nor do we think the court erred in permitting plaintiff to introduce evidence tending to show that the witness Davis had on former occasions made statements contradictory to and inconsistent with his testimony given at the trial, which statements he denied making; his attention on cross-examination first having been specifically invited to the time, place, and circumstance of each conversation in which it is claimed they were made. This testimony was admissible for the purpose of impeaching Davis. Counsel for appellant contend, however, that the questions did not relate wholly to matters of fact, but in part call for the conclusions of Davis, and were therefore incompetent, and could not properly be used as a basis to impeach him. By an examination of these questions and answers it will be seen that the matters covered by the questions which counsel claim are objectionable (that bathers got into danger, etc.) were answered by Davis in the affirmative. It was only those alleged statements of his respecting material facts in the case that he denied. As to these statements plaintiff was entitled to introduce proof, and because the questions asked for the purpose of impeachment referred to some statement not denied by Davis is not a ground for reversal.

At the conclusion of the evidence the defendant requested the court to instruct the jury to return a verdict in its favor. The refusal of the court to give this instruction is assigned as error. It is urged on behalf of appellant that it does not appear from the record that the death of Roy E. Larkin was due to any negligent act or omission of defendant. The un-

disputed evidence in this case shows that the bathing season at this resort is limited to about three months in each year, and that during the year (1903) when Larkin was drowned, fifty thousand of the patrons of this resort went in bathing, and it is admitted that there were no notices placed in the lake indicating the depth of the water, nor signs of any kind to advise the bathers of the limits of the resort within which they <sup>99</sup> could bathe with safety; neither did it keep at the resort a person with the necessary appliances to rescue bathers from drowning when in danger. In fact, the only supervision exercised by defendant over its patrons who bathed in its resort, as shown by the evidence of its general manager, J. E. Langford, was to invite and carry them out on the raft to "deep water." From that time on the bathers were left to shift for themselves, and, as stated, no means of rescue was provided by defendant, in case any of them, through lack of information, inadvertence, or otherwise, got into water beyond their depth, or a storm arose, or their situation was otherwise rendered perilous. And there is abundant evidence in the record which tends to show that an agent of the company had notice an hour or more before sunset of the peril that deceased and his companion, Ross Wells, were in, and that no effort was made by defendant to rescue the boys until about 9 o'clock that night. It is well settled that the owners of resorts to which people generally are expressly or by implication invited to come are legally bound to exercise ordinary care and prudence in the maintenance and management of such resorts, to the end of making them reasonably safe for the visitors. And when the business is that of keeping or carrying on a bathing resort, the authorities hold that the proprietors or owners thereof are not only required to exercise that same degree of care and prudence with respect to keeping the premises in a reasonably safe condition, which the law imposes upon keepers of public resorts generally for the protection of their patrons, but the law imposes upon them the additional duty, when the character and conditions of the resort are such that because of deep water or the arising of sudden storms, or other causes, the bathers may get into danger, of having in attendance some suitable person with the necessary appliances to effect rescues, and save those who may meet with accident. Not only is it the duty of the owners of bathing resorts to be prepared to rescue those who may

get into danger while in bathing, but it is their duty to act with promptness, and make every reasonable effort to search for, and, if possible, recover those who are known to be missing.

In the case of *Brotherton v. Manhattan Beach Imp. Co.*, 50 Neb. 214, 69 N. W. 757, the decedent, with a companion, was bathing in defendant's resort. The companion started to come in and discovered that Brotherton, decedent, was still <sup>100</sup> in the water; thereupon he went back and looked for him among the bathers, but did not find him. He then went and notified the employes of defendant company of Brotherton's absence. No effort was made to recover Brotherton, and he was drowned. In the course of the opinion the court said: "We think it is a reasonable inference that persons of ordinary prudence, conducting a bathing resort frequented by ten thousand people a month, should, in the exercise of ordinary care, keep some one on duty to supervise bathers and rescue any apparently in danger; and, if not, that certainly it is a reasonable inference that persons so situated should, on ascertaining that a person last seen in the water is missing—without a moment of delay—exert every effort to search for that person in the water, and not merely advise a youthful companion of the missing person to search on the land, and coolly watch the result of such search. We think, in this aspect of the case, and in this only, the evidence presented an issue which should have been submitted to the jury, and for that reason the peremptory instruction was erroneous."

In *Dinnihan v. Lake Ontario Beach Co.*, 8 App. Div. 509, 40 N. Y. Supp. 764, the decedent held a ticket entitling her to bathe in the waters of the lake adjacent to the beach. She was drowned in a deep pool near to a toboggan slide, constructed by defendant in the water. The court in that case held that, "The learned trial judge correctly instructed the jury that the defendant was bound to be active and exercise vigilance to keep the ground, whereon it invited its patrons to bathe, from becoming dangerous that this duty was an active one, and that the defendant could not escape liability by showing simply that it did nothing to produce the hole. These instructions laid down the rule of law applicable to the liabilities of keepers of bathing beaches": 21 Am. & Eng. Ency. of Law, 2d ed., 471, 472; Thompson's Commentaries on the Law of Negligence, secs. 994, 998; Cooley on Torts, sec.

606; *Boyce v. U. P. Ry. Co.*, 8 Utah, 353, 31 Pac. 450, 18 L. R. A. 509; *Hart v. Washington Park Club*, 157 Ill. 9, 48 Am. St. Rep. 298, 41 N. E. 620, 29 L. R. A. 492; *Richmond etc. Ry. Co. v. Moore's Admr.*, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258; *Thompson v. Lowell Street Ry. Co.*, 170 Mass. 577, 64 Am. St. Rep. 323, 49 N. E. 913, 40 L. R. A. 345; *Sebeck v. Platdeutsche Volkfest Verein*, 64 N. J. L. 624, 81 Am. St. Rep. 512, 46 Atl. 631, 50 L. R. A. 199; *Conrad v. Clauve*, 93 Ind. 476, 47 Am. Rep. 388; *Peckett v. Bergen Beach Co.*, 60 N. Y. Supp. 966; *Breeze v. Powers*, 80 Mich. 172, 45 N. W. 130; *Dunn v. Brown County Agr. Soc.*, 46 Ohio St. 93, 15 Am. St. Rep. 556, 18 N. E. 496, 1 L. R. A. 754; *Francis v. Cockrell*, L. R. 5 Q. B. 184.

<sup>101</sup> Applying the foregoing principles of law to the facts in this case, we are not warranted in holding, as a matter of law, that the defendant was free from negligence. Neither are we prepared to say that the death of decedent was due to his own negligence. There is abundant evidence in the record to support a finding that when decedent and his companions first discovered they were in water beyond their depth, and the storm had overtaken them, they were about one hundred and eighty-five feet from the float stand, and were entirely within the radius of territory in which the patrons of the resort usually bathed. Miss Pomeroy testified that when she started to return to the pavilion to notify the people of the danger the boys were in they were about one hundred and eighty feet northwest of the float stand. F. A. Olson, a witness for the plaintiff, testified that he bathed in this resort quite frequently during the bathing season of 1903; that he walked and bathed around the float stand, and that about seventy-five yards to the north, and the same distance to the west and northwest of this stand, he could not touch bottom; that the water at these points was over a person's head. J. E. Langford, the then general manager of the resort, who was called as a witness by defendant, testified that to his personal knowledge the people, invitees of defendant company, bathed from two hundred to three hundred feet to the north and northeast from that point. He further stated, quoting his own language: "Some of them [referring to the bathers] bathed one thousand feet west; some of them north and northeast. The company knew they were bathing there, and knew the depth of the water. . . . Three hundred feet from the

pulley-frame west and northwest the depth of the water was five and one-half feet, possibly six." It is, therefore, conclusively shown that a point one hundred and eighty-five feet in any direction from the float stand would be entirely within the territory of the resort where the people, men, women, and children, usually bathed with the knowledge and consent of the defendant company. It cannot be held that decedent was guilty of contributory negligence, so long as he and his companions remained within the territory to which they and the people generally were invited to bathe, unless they, with knowledge or notice of the danger, put themselves in a position of peril, which was not shown or attempted to be shown at the trial. The undisputed evidence shows that when decedent and his companions discovered they <sup>102</sup> were in danger, they made every effort in their power to return to the pavilion.

It is urged by appellant that the condition of the premises, such as the lay and character of the bed of the lake, the depth of the water, etc., as testified to by defendant's witnesses, demonstrated that the deceased and his companions must have been out into the lake far beyond the limits within which the patrons of the resort usually bathed. These, however, were questions of fact for the jury to determine, and the jury having found adversely to the defendant on these, as well as all other issues of fact in the case, the verdict cannot be disturbed, there being ample evidence in the record to support it. There are other errors assigned, but we think they are without merit, and therefore deem it unnecessary to discuss them.

We find no reversible error in the record. The judgment is therefore affirmed, with costs.

Straup, J., concurs.

BARTCH, C. J. I concur in denying the motion to strike the bill of exceptions from the files; but upon the grounds that the charge of the court was erroneous, misleading to the jury, and prejudicial to the defendant, and that certain opinion evidence was improperly admitted over the objection of the defense. I dissent from the affirmance of the judgment.

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*If the Owner or Occupier of Land*, either directly or indirectly, induces people to come upon his premises, he thereby assumes an obligation that such premises are in a reasonably safe condition, so that persons there by his invitation shall not be injured by them or in their use for the purpose for which the invitation was extended.

This rule has been applied to the owner of a racecourse who is giving thereon public exhibitions of racing: *Hart v. Washington Park Club*, 157 Ill. 9, 48 Am. St. Rep. 298; to an agricultural society giving a fair: *Dunn v. Agricultural Society*, 46 Ohio St. 93, 15 Am. St. Rep. 556; to the owner of a park who invites the public thereto to view an exhibition of fireworks: *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. L. 624, 81 Am. St. Rep. 512; and to a street railway company which maintains a place on the line of its road for exhibitions of marksmanship: *Thompson v. Lowell etc. Ry. Co.*, 170 Mass. 577, 64 Am. St. Rep. 323.

*On the Liability of a Bathhouse Proprietor for the loss of the property of his patrons*, see *Walpert v. Bohan*, 126 Ga. 532, 115 Am. St. Rep. 114.

## TUCKETT v. AMERICAN STEAM AND HAND LAUNDRY.

[30 Utah, 273, 84 Pac. 500.]

**MASTER AND SERVANT—Defective Machinery—Proof of Precise Defect.**—An employé suing his master for personal injury caused by defective machinery need not, in order to recover, prove specifically what particular defect caused the accident. (p. 839.)

**TRIAL—Nonsuit—Weighing Evidence.**—On a motion for a nonsuit the court cannot weigh the evidence, but must consider it in the most favorable light for the plaintiff. (p. 839.)

**MASTER AND SERVANT—Negligence—Proximate Cause.**—If, in an action by an employé to recover for personal injury alleged to have been caused by defective machinery, the evidence tends to show that the master was negligent in permitting such machinery to become and remain in a defective condition, it is a question of fact for the jury to determine whether, under all of the circumstances, such negligence was the proximate cause of the injury, when it cannot be said, as matter of law, that the employé assumed the risk of injury, or was guilty of contributory negligence. (p. 841.)

**MASTER AND SERVANT—Assumption of Risks.**—A servant does not, in the first place, undertake to incur the risks arising from defective machinery, and to hold that he has assumed such risks, he must not only have known of such defect, but also of the danger arising therefrom. (p. 844.)

**MASTER AND SERVANT—Assumption of Risk—Defective Machinery.**—A laundry employé, who merely knows that an ironing machine being operated by her is running in a jerky and unsteady manner does not as matter of law assume the risk of injury arising from the machine suddenly starting forward caused by its defective condition. (p. 844.)

**MASTER AND SERVANT—Defective Machinery—Assumption of Risks.**—An employé has a right to assume that the master will use reasonable diligence in furnishing him with a machine suitable to operate, and if the master fails to perform this duty, the employé is entitled to recover, unless the defect in the machine which caused the injury was known to such employé, or so patent that he could readily have observed it. (p. 845.)



**MASTER AND SERVANT—Defective Machinery—Assumption of Risks—Burden of Proof.**—It by no means follows that simply because an employé may have believed that a machine operated by him was defective, that, as matter of law, he knew, or ought to have known, that it was defective to the extent that it was dangerous, and in such case the burden of proving that the employé was not ignorant of the danger is upon the master. (p. 846.)

**MASTER AND SERVANT—Order of Master—Negligence—Proximate Cause—Burden of Proof.**—An order of the master to his employé to perform his work, which is dangerous, in a particular manner may constitute negligence, and when it does, the employé injured by compliance with such order may count upon such negligence when suing for the injury, but he has the burden to prove that the obeying of the order was the proximate cause of the injury. (p. 848.)

**MASTER AND SERVANT—Order of Master—Assumption of Risks—Contributory Negligence.**—In an action by an employé to recover for an injury sustained through his master's negligence in ordering him to do dangerous work in a particular manner, the master may plead the defense of assumed risk and contributory negligence. (p. 849.)

**MASTER AND SERVANT—Order of Master—Assumption of Risks—Contributory Negligence.**—If a servant is directed by his master to perform a certain piece of dangerous work in a particular manner, he is ordinarily justified in obeying the order thus given without being chargeable with the assumption of risk incident to the work, or with contributory negligence in obeying the order, unless the risk arising therefrom is open and obvious or when no person of ordinary prudence, would obey the order. (p. 849.)

Powers, Straup & Lippman, for the appellant.

Sutherland, Van Cott & Allison, for the respondent.

**276** HOWELL, D. J. The plaintiff brought this action to recover damages from the defendant for personal injuries alleged to have been sustained **277** by her while working at a shirt-bosom ironer in a laundry operated by defendant, and as a result of its negligence. The complaint, after alleging that the defendant was at the time of the accident and the bringing of the action a corporation organized and existing under the laws of the state of Utah and engaged in the business of operating a laundry, in which was used a certain machine called a shirt-bosom ironer, proceeds to set forth the grounds of negligence on the part of the defendant in respect to the said machine and the plaintiff while operating it, as follows: 1. That the defendant so negligently and carelessly adjusted the ironing machine, and so negligently and carelessly suffered and permitted the same to be out of repair, and so negligently and carelessly suffered and permitted the brake and levers of said machine to be and remain rusty and difficult of operation, so that the said machine, and especially the

pressure of the heated roller on the ironing board or table, could not be regulated and controlled, whereby and because of which the ironing board or table would not freely pass underneath the roller of the said machine at the proper distance and place intended for it, and would not release itself and return automatically, as was intended. 2. That the defendant so negligently and carelessly adjusted the said machine and suffered and permitted it to be out of working order, so that it would run in a jerking and irregular manner, and so that the heated roller did not work properly, but at times slipped and revolved with greater rapidity than at other times. 3. That the defendant negligently and carelessly failed to guard or protect the roller of said machine so as to prevent the hand or arm of the person operating it from being drawn in between the said roller and the ironing board or table. 4. That the defendant carelessly and negligently failed to properly instruct the plaintiff in respect to the mechanism of the said machine, or as to the use thereof, or as to the manner of prosecuting or performing her work thereat, and failed and neglected to warn her of the dangers and risks incident thereto, and especially of the danger and risk of her arm or hand being drawn in between the roller and the ironing table or board of <sup>278</sup> the said machine, although plaintiff was ignorant of the said dangers and risks. 5. That on the contrary, the defendant negligently and carelessly instructed and directed the said plaintiff in the prosecution of her work to take hold of said ironing board or table with her hands, and to hold thereto so as to prevent it being propelled too far underneath and past the said roller of the said machine, and by hand to pull or draw the same back and return it to its former position, all of which was an improper and unskillful way and manner of prosecuting said work, as plaintiff is now informed, but of which fact she knew not at the time of her injury; such method being made necessary, however, by reason of the machine being improperly adjusted and out of working order.

The complaint concludes by alleging that whilst the plaintiff was operating the ironing machine as directed, whilst she was exercising ordinary care on her part, and whilst she was ignorant of the dangers involved therein, her hand was, in consequence of the aforesaid acts of negligence of the defendant, drawn in between the roller and the ironing board

and table, as a result of which it was injured and a portion of it had to be amputated.

The answer of the defendant admits: 1. That at the time of the accident and of the bringing of the action it was a corporation existing under the laws of Utah; 2. That it was at said times engaged in the business of operating a laundry, and was using therein the ironing machine described in the complaint; 3. That the plaintiff, when injured, was in the employ of the defendant, who was operating the machine in question, and was injured as set forth in the complaint, but denies each and every other allegation (that is, the answer denies that the defendant was guilty of any of the acts of negligence set forth in plaintiff's complaint). Further answering, the defendant affirmatively alleges that the plaintiff had been employed to run the machine, was familiar with its operation, understood the dangers incident to running it, and therefore assumed all risk of injury therefrom. Also that plaintiff's act in placing her hand on the ironing board as it was about to pass under the heated roller was unnecessary, and constituted <sup>279</sup> negligence, which proximately contributed to her injury.

The facts, as developed at the trial from the testimony introduced on behalf of the plaintiff, are as follows: The defendant was, at the time the plaintiff received her injuries, engaged in the business of conducting a laundry in Salt Lake City. The plaintiff, at the time of the accident, was about twenty-two years of age, was employed by the defendant as a laundress, and had been so employed for about two years and a half. Prior thereto she had been engaged in the same occupation at another laundry for about a year and a half, and, during her entire experience, had worked at several different ironing machines, more or less similar to that at which she was injured, although she had no technical knowledge of the mechanism of any of them. She had operated two different sorts of mangles, which, according to her testimony, consist of a pair or more of large rollers, between which the articles to be smoothed are passed over a stationary table in front of them, apparently much as they would be passed between an ordinary clothes wringer, and they are used for ironing large pieces, like sheets and blankets. Some mangles are provided with guards in front of the rollers to prevent the hands from being drawn in between them while feeding the cloth in;

others are not. The plaintiff had had experience with both. She had also worked on a body ironer, a machine for smoothing the unstarched portions of a shirt, and which is similar to a mangle, only that it is smaller, and is operated in practically the same manner. She had run a wristband machine, which consists of two rollers which are brought together by means of pressing on a foot treadle, the wristband being fed between the rollers much in the same manner as pieces are fed into a mangle; the differences being that the wristband ironer is smaller than the mangle, there is no table in front of it, and the upper roller is heated, which is not the case with the mangle. The shirt-bosom ironer by which plaintiff was injured differs in construction and operation from any of the ironing machines that have been described, and which may be regarded as of the mangle type. It consists of a table <sup>280</sup> or board fastened to a pivotal stand; the top of the table or board being about four feet from the floor. The shirt bosom is fastened to the table or board, and then the latter is pushed forward by means of a foot treadle on the left side of the machine, until it comes under a heated roller. The treadle is connected with three pulleys, one a stationary pulley, and the other two slip pulleys. Two belts run from the pulleys to a countershaft, which is kept revolving by the motive power of the plant, steam being the power used in this laundry. By pressing the toe upon the treadle, one of the belts is thrown onto the stationary pulley from the outside slip pulley, and the movable table or board is sent forward under the before-mentioned roller, and when the toe is lifted from the treadle, and the heel pressed thereon, the other belt is thrown from the other slip pulley onto the stationary pulley in a reverse motion, and the movable table or board is then apparently supposed to return automatically to its former position. Before the ironing table or board is set in motion the shirt bosom is fastened thereto, under side uppermost, with the neckband toward the roller and the tail of the shirt toward the operator; the ironing table or board being about the size of an ordinary shirt bosom. On the right of the machine is a lever, which works in a ratchet wheel; the purpose thereof being to bring the ironing table or board up to the roller and thus regulate the pressure.

The plaintiff was set at work at this shirt-bosom ironer as soon as it arrived from the factory and was installed in de-

fendant's laundry, which was about three months before the accident occurred. She had never, prior to that time, used a laundry machine precisely like it, though she had for about a year prior thereto operated a shirt-bosom ironer, which was similar to it, except that it had no lever on it to regulate the pressure. When the machine was set up the superintendent of the laundry, Mr. Thomas Mathews, explained to the plaintiff how it should be operated. He showed her how to fasten on the shirt, which was done in a somewhat different manner than on the other ironer, explained to her that the purpose of the lever was to bring the ironing table or board <sup>281</sup> up to the roller, and instructed her to run it through to the end of the table or board and back again. The plaintiff testified that, when she did so, the table or board would return automatically. Ten days or two weeks later the same superintendent instructed her to let the table or board run not only through to its end, but clear through to the bumper, which consisted of an arm on the back bar of the frame of the machine, and opposite the operator. Plaintiff testified that she did so, and was then obliged to take hold of the forward end of the table or board with her hands and pull it back. All this time the machine ran in an unsteady and jerky manner, and the plaintiff testified the superintendent, as well as the foreman, had frequently passed by her while it was running in that manner and had had an opportunity to observe it. Indeed, the plaintiff called his attention to the fact. Then he went on a trip, and about a week after his return, on the morning of the accident, the plaintiff made complaint to him about the manner in which the machine acted. She told him that the lever was rusty; that it was difficult to lift it; that the machine ran very hard; that it sometimes went slow and sometimes went fast; and that she could never depend upon it. The superintendent, who was standing by her at the time and in a position to observe the machine, assured her that it would regulate itself in time, that it would run easier in time in using it, and he thereupon instructed her to run it so that the table or board would not touch the bumper. He also told her to keep her hand on top of the board on the shirt, in order to prevent it from going clear through to the bumper. The plaintiff commenced to operate the machine in conformance with these last instructions given her; this being the first time she had ever put her hand on top of the board or

table, although she had previously taken hold of the edge of it to pull it back when it was being run through to the bumper. When operating the machine in this manner, according to her latest instructions, she was compelled to pull the table or board back with her hands because it did not return automatically. She had worked in this manner about an hour. Her left hand was on top of the table or board to steady it <sup>282</sup> and prevent it going clear through to the bumper, when it gave a sudden start forward and the table or board went more swiftly than ever before, and thus drew her hand right in between it and the roller, and she was unable to get it out until the superintendent came to her assistance. She was then taken to the hospital and a portion of her hand amputated.

At the close of the plaintiff's case the defendant moved for a nonsuit, the principal grounds of which may be reduced to the following propositions: 1. It is contended that there was no evidence of negligence on the part of the defendant in respect to the machine in any particular, or toward the plaintiff who was operating it; 2. That, even assuming there was, the condition of the machine was entirely open and obvious, the plaintiff was bound to know it, and the danger arising from its operation was one of the assumed risks of plaintiff's employment; and 3. That in operating the machine in the manner she did the plaintiff was guilty of contributory negligence. The court sustained the motion for a nonsuit and dismissed the case, and from the judgment entered thereon, the plaintiff has appealed to this court.

Though made as one of the grounds for a motion for a nonsuit, counsel for respondent did not, in their oral argument, nor do they in their brief, very strenuously contend that the plaintiff failed to establish that respondent was negligent in permitting the machine to be in the condition disclosed by the testimony in this case. The evidence shows that, "when the machine is in good working order, the table comes back automatically." It is true that while appellant testified positively that to the knowledge of the respondent, through its superintendent, the machine ran in a jerky and unsteady manner while she was operating it, and that the ironing board or table would not return automatically to its place after being sent forward under the roller, she was not able to point out the particular defect in the machine which was the cause of it running in the manner it did and being in the condition

283 in which it was. This difficulty was, however, fully considered in the case of *Mangum v. Bullion etc. Min. Co.*, 15 Utah, 534, 50 Pac. 834, and it was therein held that it was not necessary for the plaintiff to point out the precise defects. It appeared in that case that the plaintiff was injured by reason of the unsafe and defective condition of the machinery connected with and used in the hoisting of a cage in defendant's mine. Justice Bartch, delivering the opinion of a unanimous court, used the following language with reference to the objection made that the particular defect that caused the injury was not pointed out by the plaintiff: "It is also urged that the respondent cannot recover, because he failed to show specifically what particular defect caused the accident. If this position were sound, then, in many cases of this character, the injured servant could not recover, regardless of the negligence of the employer; for, while such servant may know the general or immediate cause of the injury, it frequently happens that he is unable to point out the particular defects which actually did cause it, and yet it may be clear enough that the employer's negligence was the proximate cause. In this case the immediate cause of the injury was clearly shown; and if, as the jury must have found, the occurrence took place through the negligence of the employer, and if the evidence warrants such a finding, and we think it does, then the plaintiff is entitled to recover notwithstanding that no witness was able to name with absolute certainty the exact mechanical defect which caused the cage to stop. In *Nelson v. St. Paul Plow Works*, 57 Minn. 43, 58 N. W. 868, Mr. Justice Mitchell said: 'If the evidence justified the jury, as we think it did, in finding that the "drop" fell because of the defective condition of the machine, and that such defective condition was chargeable to the negligence of the defendant, it was not essential to plaintiff's recovery that he should be able to show what the exact nature of the defect was': *Atchison etc. R. R. Co. v. Lannigan*, 56 Kan. 343, 42 Pac. 343."

So, here, if the testimony of the plaintiff be true, and we must assume that it is, for upon a motion for a nonsuit we are not only not permitted to weigh testimony as a jury would, but, on the contrary, must consider it in the most favorable light for the plaintiff, then there can be no doubt that the machine in question was in a very defective condition

and defendant knew it, or ought to have known it, for the matter was brought to its attention through the complaints of the plaintiff and by the observation of the superintendent. The plaintiff could not say whether the defect resulted from <sup>284</sup> a failure to adjust the machine properly, or whether it was due to it being out of repair—all she could say was that it was not running shortly. The plaintiff was not only ignorant of the mechanism of machinery in general, but she had no knowledge of the mechanism of this particular machine, though she had operated it for some time. A person may operate a machine for a long time and yet have no technical knowledge of its construction or operation, so it is not surprising that, while the plaintiff realized that the machine was not running evenly as it should, she could assign no particular reason for it. The plaintiff also testified that, when she commenced to use the machine and allowed the table or board to run just to its end, it would return automatically to its former position; that, when she allowed it to run to the bumper, it would not so return; and that, when she again only allowed it to run to the end, it would not then return as it did at first.

It is insisted by counsel for the defendant and respondent that the failure of the table or board to return automatically could have no bearing on the accident, because the plaintiff was injured while the table or board was in the forward motion, and, while that may be true, the behavior of the table or board under these various circumstances and at these different times conclusively demonstrates that there was something wrong with the machine, for the reasonable inference from the testimony is that the table or board should have returned automatically under any and all circumstances, and would have done so had the machine been in good working order. What caused the irregularity in the action of the board or table is not so clear, but this defect, as well as the jerky running, was known to the defendant, and the causes, therefore, were also known, and ought to have been known by it because of its duty to inspect its machinery and keep it in repair. Under such circumstances the jury might reasonably say that the defendant had not performed its full duty to the plaintiff in exercising ordinary and reasonable care to obtain a reasonably safe machine for the plaintiff to operate. As was said in *Mangum v. Bullion etc. Min. Co.*, 15 Utah, 534, 50 Pa.



834: <sup>285</sup> "While the employer is not required to furnish machinery and appliances for the use of its servant which are absolutely safe, or to furnish the best which can possibly be obtained, still it is his duty to exercise ordinary and reasonable care and diligence to obtain and furnish such as are reasonably safe, and reasonably well adapted to perform the work for which they are intended, and such as the servant may, with the exercise of ordinary prudence and care, use in the performance of his work with reasonable safety to himself; and it is likewise the employer's duty to exercise reasonable care in operating the same, and to keep them in suitable condition and repair. Whether in the case at bar the defendant, as employer, performed its duty in these regards, or whether it was negligent in furnishing the machinery and appliances used by the injured servant, or in keeping them in suitable condition and repair, were questions of fact, to be determined by the jury from all the circumstances surrounding the occurrence which caused the injury, and which were in evidence; and the record fails to present a case which authorizes the court to say as matter of law that the defendant was not negligent, and that the plaintiff cannot recover. Such a judgment is warranted only where the record presents such a state of facts that all reasonable men must arrive at the same conclusion from a consideration of them: *Hall v. Ogden City Ry. Co.*, 13 Utah, 243, 57 Am. St. Rep. 726, 44 Pac. 1046; *Saunders v. Southern Pac. Co.*, 13 Utah, 275, 44 Pac. 932."

If there was sufficient evidence introduced by the plaintiff to justify the court in submitting to the jury the question of whether or not the defendant was negligent in permitting the machine in question to be in a defective condition, as alleged in the complaint, then, to bring the case at bar squarely within the *Mangum* case (15 Utah, 534, 50 Pac. 834), it is only necessary to consider whether or not such negligence, if found by the jury, could be said by it to be the proximate cause of the injury. It is strenuously insisted by counsel for the defendant that, if the plaintiff had not put her hand on top of the ironing table or board and permitted it to remain there until the table or board passed beneath the roller, she would not have been injured, and therefore that circumstance was the proximate cause of the injury. This statement of counsel is based upon the assumption that the testimony of the

plaintiff that the table or board at the time of the accident ran swifter than ever before cannot be credited. As has already been pointed out, however, this court is not warranted in weighing the testimony of the plaintiff and concluding therefrom that it is not to be believed. <sup>296</sup> We think there was sufficient proof of the negligence of the defendant to go to the jury, and the court was not justified in withdrawing the case from their consideration, unless it can be said as matter of law either that plaintiff by her conduct assumed the risk of injury, or that she was guilty of contributory negligence in doing what she testified she did; and, indeed, the principal justification for the granting of the nonsuit herein by the trial court that is put forth by counsel for respondent is that she not only assumed the risk, but that she was guilty of contributory negligence.

These two well-recognized doctrines of the law of master and servant, that of assumed risk arising from the contract of employment and that of contributory negligence growing out of the law of torts, as applied to the contractual relation of master and servant are not difficult to state in general terms. They are, however, so closely related, although appertaining to different departments of the law, that they are generally united when speaking of the defenses which a master may have to an act of negligence on his part toward his servant, and not infrequently they are somewhat confused, one with the other, by the courts. Whatever difficulties present themselves in regard to these two principles relating to the law of master and servant consist not so much in any uncertainty in the doctrines themselves, but in applying them to the varying facts of the different cases, and these difficulties we must necessarily encounter in this case. A general statement of these two doctrines, which has been frequently quoted with approval in this court, is found in the Mangum case (15 Utah, 534, 50 Pac. 834), and, inasmuch as there is a similarity between the facts in that case and in the case at bar, we deem it proper to quote somewhat extensively from the opinion in that case, in order that we may consider how the principles therein enunciated affect the case before us. Justice Barch speaking upon this subject, used the following language: "It is also insisted for the appellant that the injury which the plaintiff sustained was incident to his employment, and that he assumed the risk. The mere fact that the respondent was

aware that the cage was shaking, and not running smoothly, is not sufficient to justify us in <sup>287</sup> holding that he had assumed the risk, and there is no evidence to show that the defects were of such an obviously dangerous character that he ought to have appreciated the risk, and ceased his employment, or that a man of reasonable precaution, placed under similar circumstances, would have done so. It is shown that the plaintiff was not skilled in mechanic arts, had never worked in a machine-shop, and never had anything to do with to rely, except in this mine. Therefore, he had the right to reply, at least to a reasonable extent, on the judgment of his employer, who is presumed to have a knowledge of the machinery used in his business, and to assume that he would discharge his duty by furnishing reasonably safe machinery, and keeping it in proper condition and repair. Where an employé has knowledge of defects in machinery used in his employment, and the defects are not so dangerous as to threaten immediate injury, or the danger is not such as to be reasonably apprehended by him, his continuance in the service will not defeat a recovery for injuries resulting from such defects. If, however, the defects are so obviously and immediately dangerous that a person of ordinary prudence and precaution would refuse to use the machinery, then, if the servant continues its use, he assumes the risk. We think it was a question for the jury to determine whether, under all the circumstances in evidence in this case, the employé by continuing in his employment with knowledge of the defects, assumed the risk of the injury which he sustained. 'Mere knowledge of the defects is not sufficient, unless it does or should carry to a servant's mind the danger from which he suffered. A servant may assume that the master will do his duty; and therefore, when directed by proper authority to perform certain services, or to perform them in a certain place, he ordinarily will be justified in obeying orders, subject to the qualification that he must not rashly or deliberately expose himself to unnecessary and unreasonable risks which he knows and appreciates. It is one thing to be aware of defects, and another to know and appreciate the risks resulting therefrom': Thomas on Negligence, 851.

"In *Patterson v. Pittsburg & C. R. R. Co.*, 76 Pa. 389, 18 Am. Rep. 412, Mr. Justice Gordon, delivering the opinion of the court, said: 'In this discussion, however, we are not to forget that the servant is required to exercise ordinary pru-

dence. If the instrumentality by which he is required to perform his service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such cases the law adjudges the servant guilty of concurrent negligence, and will refuse that aid to which he would otherwise be entitled. But where the servant, in obedience to the requirements of the master, incurs the risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the rule is different. In such case the master is liable for a resulting accident.'

"In *Lee v. Southern Pac. R. R. Co.*, 101 Cal. 118, 35 Pac. 572, the supreme court of California, respecting the risk of an employé, said: 'It is not only <sup>288</sup> necessary that an employé should know of the defect in the machinery in order to hold that he assumed the risk, but the danger arising from the defect must also be known or reasonably apprehended by him.'

"So, in *Northern Pac. R. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29 L. ed. 755, Mr. Justice Field said: 'The servant does not undertake to incur the risks arising from the want of sufficient and skillful collaborators, or from defective machinery or other instruments with which he is to work. His contract implies that, in regard to these matters his employer will make adequate provision that no danger will ensue to him. This doctrine has been so frequently asserted by courts of the highest character that it can hardly be considered as any longer open to serious question' "; citing cases.

Comparing the facts of that case with those developed in the case at bar, we find that just as the plaintiff therein knew that the cage was shaking and rattling, so the plaintiff herein knew that the ironing machine was running in a jerky, unsteady manner, but from mere knowledge of such a fact it could not be said in either case that the plaintiff had assumed the risk. In the *Mangum* case (15 Utah, 534, 50 Pac. 834), it was shown that the plaintiff was not skilled in the mechanic arts, nor experienced in the construction of machinery, though he had worked in the mine in which he was injured some time prior thereto. So in this case, though plaintiff had been

operating the machine at which she was injured for three months, she had no technical knowledge of machinery and had but an imperfect knowledge of the construction of the particular machine in question. In case cited the plaintiff knew that, if the cage stopped suddenly, he would be injured, and the plaintiff in this case knew that, if the machine suddenly started forward, her hand would probably be drawn in between the roller and the ironing board or table. But in the former case the plaintiff could not foresee that the rattling and shaking of the cage would cause it to stop as it did, and in the latter case the plaintiff could not foretell that the table or board would start suddenly forward as it did, simply because it was not running smoothly, and, therefore, in neither case could the plaintiff have reasonably apprehended that the defects in the machinery, of which they were cognizant, threatened immediate injury to himself or herself in such a way as to enable the court to <sup>289</sup> say as matter of law that he or she assumed the risk or was guilty of contributory negligence.

So far we have considered the two questions, that of assumed risk and that of contributory negligence, together, because the facts of both the case cited and the case at bar are applicable to each of them, but inasmuch as there are other facts in both cases which affect the question of contributory negligence, but there are no more that bear on the question of assumed risk, we shall henceforth consider them separately.

The doctrine of assumed risk, considered by itself, is well stated in *Choctaw etc. R. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. Rep. 24, 48 L. ed. 96, which has also been quoted with approval by this court, as follows: "The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. The employé is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where the defect is known to the employé, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus, in the face of knowledge, and without objection, without assuming the hazards incident to

such a situation. In other words, if he knows of the defect, or it is so plainly observable that he might be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master notwithstanding the defect, and in such case cannot recover."

So, in the case at bar, the plaintiff had a right to assume that the defendant would use reasonable diligence in furnishing her with a machine suitable to operate, and if the defendant failed to perform that duty, as it undoubtedly did, according to her testimony, then plaintiff was entitled to recover unless the defect in the machine which caused the injury was known to her, or so patent that she could readily have observed it; but, as has been shown, she did not, at the time of the accident, know precisely what was the difficulty<sup>290</sup> with the machine, nor did she know when she testified, and inasmuch as she was not a mechanic, we cannot say as matter of law that she should have observed it, although she may have believed there was something the matter with the machine.

Counsel for respondent state the general doctrine of assumed risk from another point of view, but no less accurately, as follows: "The master is not liable because an appliance which he furnishes for the use of his servants is dangerous, but because he permits him to work with such an appliance in ignorance of the danger."

Applying this general statement of the law to the case at bar, we may say that, even though the machine upon which the plaintiff was employed to work was in a dangerous condition, the defendant would not be responsible unless the plaintiff was ignorant of such danger. Of course, counsel contends that she was not ignorant, while we think that the evidence tends to show she was, so that the difference is not as to what the law of assumed risk is, but as to how it should be applied. Counsel argues that, because the plaintiff knew that the machine was defective, she knew, or ought to have known, of the danger as a matter of law, but, as has already been explained, it by no means follows that simply because she may have believed that the machine was defective, that as a matter of law she knew, or ought to have known, that it was defective to the extent that it was dangerous, and therefore, inasmuch as the burden of proving that the plaintiff was ignorant of the

danger is upon the defendant, the question should have been left to the jury.

Counsel cite a large number of cases in which it was held, applying the principle of assumed risk stated substantially in the language above quoted to the facts of the case under consideration, that the plaintiff was not ignorant of the danger arising from the defective machinery, and was therefore not entitled to recover. As has already been said, however, the applicability of the principle depends on the precise circumstances <sup>291</sup> of each case. An attempt, even if possible, therefore, to distinguish all those cases from that at bar, would be unprofitable. But inasmuch as counsel rely particularly upon the case of *Kupkofski v. Spiegel Co.*, 135 Mich. 7, 97 N. W. 48, and inasmuch as the facts in that case are more similar to those in the case at bar than most of the cases cited by counsel, we deem it right to consider that case somewhat in detail and by way of comparison. In that case plaintiff sued to recover damages for personal injuries received by her while operating a shirt-bosom ironer in defendant's laundry. The ground of negligence relied on was that the defendant allowed the machine, which was apparently the same as that in question here, to become out of repair. The testimony introduced on behalf of the plaintiff showed that she was seventeen years old, and had worked at the machine about two weeks, when the belt which furnished the power to the machine became loose and caused it to run with a jerky motion. With the machine running in this fashion, and while the plaintiff was holding the shirt on the ironing table or board, about six inches away from the roller, the table or board stopped and then started with a jerk, drawing plaintiff's hand under the roller. The trial court directed a verdict for the defendant, and on appeal the judgment was affirmed on the ground that the plaintiff assumed the risk, and was also guilty of contributory negligence. It will be noticed at once that, so far as the question of assumed risk is concerned, there is an all-important difference between the facts in the Michigan case and in the case at bar. In the former case the plaintiff observed the precise defect that caused the injury. She knew that the belt was loose, and that, when the friction became unusual, the machine would slow down, and, as the belt moved again to perform its office, the machine would start up again, so that she knew exactly what to expect when the machine

stopped. On the contrary, in the case at bar the plaintiff only knew that the machine ran in a jerky, unsteady fashion. There was no defect apparent to her, like a loose belt, which indicated in any manner that the machine would, at any time run faster than ever before. In the former case the court <sup>292</sup> could well say that the plaintiff should have realized the danger, that she was not ignorant of it, whereas in the present case it is impossible for the court to so say.

There only remains, then, one question to consider, namely, whether or not the court shall say that the plaintiff was guilty of contributory negligence; whether or not, under similar circumstances, an ordinarily careful person would have put his hand on the ironing board or table when it was going forward, as the plaintiff did; and whether or not such action on plaintiff's part proximately contributed to her injury, for such is the test in determining this question. In dealing with this matter, it is necessary, as already indicated, to consider certain facts developed at the trial, which were not adverted to in determining whether or not the plaintiff assumed the risk. The plaintiff in the present case complained to the defendant's superintendent about the machine not running steadily, and received the answer that it would be all right in time—after it had been used a while. So in the Mangum case (15 Utah, 534, 50 Pac. 834), heretofore cited, the plaintiff called the superintendent's attention to the defective condition of the apparatus, and was informed that the cables were going to be changed pretty soon, and that another cage would then be used. But the facts in the present case are somewhat stronger for the plaintiff than in the Mangum case (15 Utah, 534, 50 Pac. 834), because the superintendent not only used language to the plaintiff which was tantamount to an assurance of safety, as in that case, but went further, and gave her a direct and positive order to put her hand on top of the ironing table or board to prevent it going clear through to the bumper, the obedience to which placed her in a position to be injured. The effect of such a direct and positive order from a master to a servant to perform an act in the course of his employment, which is dangerous, or to perform such an act in a dangerous manner, is twofold. It may constitute an additional act of negligence on the part of the master. If the order of the master constitutes an act of negligence, and if the servant obeys it, and by reason of such obedience is injured, he can count upon such an act of neg-



gence <sup>203</sup> when he brings an action to recover for his injury. In order, however, to recover, he must show that the obeying of the order was the proximate cause of the injury. So, in this case, the plaintiff did right in alleging in her complaint as a ground of recovery that the superintendent gave the order he did, though a recovery on that ground might be defeated, because we are inclined to think that the obedience to the order was not the proximate cause of the injury—the plaintiff might have placed her hand on the table or board with safety had it not jumped forward—but this question should be left to the jury. To the act of negligence in giving such an order, there may, of course, be pleaded the same defenses as to any other act of negligence, including that of assumed risk and contributory negligence, for it logically follows that a servant is not excused in obeying an order from the master when the risk arising therefrom is open and obvious, or when no person of ordinary prudence would do so. Viewed in another light, such an order of the master may have an important bearing upon the question of whether or not the plaintiff was guilty of contributory negligence. It has also been held in certain cases that, when a servant is directed by his master to perform a certain piece of work in a particular manner, he will ordinarily be justified in obeying the order so given, without being chargeable with the assumption of risk incident to the work: *Cook v. St. Paul etc. R. Co.*, 34 Minn. 45, 24 N. W. 311; *Strong v. Iowa C. R. Co.*, 94 Iowa, 380, 62 N. W. 799.

But it is well said by Mr. Labatt in his work on Master and Servant, section 438: "For practical purposes, however, this principle is not of much importance, as the ultimate question to be determined in this, as in all other classes of cases when the defense of an assumption of the risk is put forward, is simply whether the servant had knowledge, actual or constructive, of that risk, and encountered it without being subjected to what the law regards as coercion. . . . No differentiating significance, therefore, can be ascribed to the fact that the injury was received as the result of obeying an order, where it appears that the servant was merely directed to do something which was a part of the regular work of the establishment in which he was employed, and that the risk to be encountered was fully comprehended by him."

<sup>204</sup> So, if it be, as in our opinion it was, the case that plaintiff had no knowledge, actual or constructive, of the danger

to which she exposed herself by obeying the superintendent's order, then, of course, no negligence on her part can be predicated upon her obedience to the order. But if it be said, and it well might be, that, if the plaintiff had placed her hand on the table or board without an order from the master so to do, she would have been guilty of contributory negligence, then such a conclusion might not be warranted when the order was given, because, though the plaintiff might well have doubted the safety of so doing if left to herself, the direction of the master might be said to have set her doubting mind at rest, and induced her to do what she would otherwise not have done. She testified, in fact, that until ordered to do so she had never placed her hand on top of the ironing table or board, though she had taken hold of the edge of it to draw it back when it had gone clear through to the bumper, and she might well have thought, when the board or table was not running as it should, that the order of the master to put her hand on top it was for the purpose of preventing it from going too far. The order of a master, or his representative, under such circumstances as these, tends to negative the contention that the servant voluntarily encountered a danger which was, or ought to have been, comprehended by him; or, putting it in another way, it goes to show that the servant's ignorance of the hazard he was running in doing what he did is excusable.

Mr. Labatt, section 439, adverts to this subject in the following manner: "But there is also a large class of cases in which that fact is treated as a differentiating element, and in which the courts apply a doctrine which, in so far as it is susceptible of formal enunciation, may be stated as follows: Although the circumstances, when abstracted from the fact of the giving of the order, may be such as to justify a court in holding that the servant appreciated the danger to which his injury was due, and was negligent in subjecting himself to that danger, such a conclusion is, in a large number of instances, not warrantable, if the testimony goes to show that the immediate occasion of his being subjected to that danger was his compliance with the order. The effect of this doctrine is that where the servant, in obedience to an order, performs a duty which, though dangerous, is not so dangerous as to threaten <sup>295</sup> immediate injury, or where it is reasonably probable that the work may be safely done by using

more than ordinary caution or skill, he may recover if injured. It will be seen that this rule, when analyzed, amounts to nothing more than a statement that, in determining what is ordinary care on the part of a given individual, all the circumstances of his position should be regarded, including, in cases like the present, the servant's orders, the demands of his duty, the apparent risk to be met, and the purpose of his action, no less than his physical surroundings. Having weighed all these considerations, unless the case then discloses that the risk was such as would not be taken by a man of common prudence so situated, the court cannot justly declare that the taking of that risk by the servant, in obedience to orders, was negligence. The practical result of such a doctrine, when stated in terms of the servant's knowledge, is that the servant may maintain an action, unless he not only knows what is the risk to be encountered, but also that it will probably be attended with injury which he cannot avoid by the exercise of care and caution."

The same author then gives the reasons upon which this doctrine is based, and, so far as they are applicable here, they are as follows (section 440):

1. That "The servant does not stand on the same footing as the master. In other words, when a servant did not assert his judgment in opposition to the supposed better judgment or stronger will of the master, the law usually allows the jury to determine whether he was negligent, or acted in reliance upon the judgment of his master, or out of constrained acquiescence in the rule of obedience which his relation as servant imposed."

2. That "The servant is entitled to rely on the master's performance of his duties."

The juridical theory is that the order, having a natural tendency to throw the servant off his guard, may properly be considered to excuse him from the exercise of the same degree of care as would have been incumbent on him if the case had not involved this factor.

3. "That when a servant is suddenly called upon to execute a piece of work in a particular manner, under the eye of his employer, or his employer's representative, a careful observation of the conditions is generally quite impracticable, if the direction is to be carried out with the promptitude which is expected from subordinates."

296 It follows from what has been said that even if we might have said that the plaintiff did not act with that carefulness which everyone is legally bound to exercise, if no order had been given by the master to act just as she did, the giving of such an order prevents us from saying so.

So far as the question of contributory negligence is concerned, the case at bar is also easily distinguished from the case of *Kupkowski v. Spiegel*, 135 Mich. 7, 94 N. W. 48, because the plaintiff herein was ordered by the master to change her method of feeding the machine from that to which she was accustomed to one of increased and extraordinary danger, and within a short time after such order was given, while operating the machine in accordance therewith, was injured, whereas the injury to the plaintiff in the Michigan case was in no sense the result of the change made by her in obedience to the master's orders in the manner of operating the machine from a comparatively safe process to one conceded to be extremely dangerous. Practically all that has been said concerning the effect of an order from the master is applicable to an assurance of safety given by him, and especially as it affects the question of whether the servant can be charged with contributory negligence; for, inasmuch as the knowledge possessed by the servant is ordinarily inferior to that of the master, the former is justified in relying upon the statement made by the latter as to the extent of the danger, or, as it is very aptly expressed by Mr. Labatt, section 451: "In view of this disparity of information, an assurance of safety, like a specific order, may be regarded as having had the effect of lulling the servant into a feeling of security and given him good reason to believe that there was no need for the vigilance which he would otherwise have exercised."

We are of the opinion that the case should have been submitted to the jury, and that the trial court erred in sustaining the motion for a nonsuit.

The cause is reversed, and a new trial granted. Costs of this appeal are to be taxed against respondent.

Bartch, C. J., and McCarty, J., concur.

*The Liability of an Employer to His Employé for injuries resulting from defective machinery and appliance, including the doctrine of contributory negligence and assumption of risks on the part of the employé is discussed in the notes to Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 289; Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 881.*

## STATE v. FRESHWATER.

[30 Utah, 442, 85 Pac. 447.]

**TRIAL—Continuance—Absence of Witnesses.**—A motion for a continuance on the ground of the absence of witnesses is properly denied, where the applicant does not show that he has communicated, or attempted to communicate, with them, nor made any effort to procure their attendance except to procure a subpoena, and states no facts tending to show that there is any probability that they will be present at the next term of court, or that their testimony can be procured within a reasonable time. (p. 854.)

**EVIDENCE—Handwriting.**—A witness who has seen a person write but once is competent to testify as to whether or not he wrote a particular letter. (p. 856.)

**EVIDENCE—Typewritten Letters.**—Evidence by an expert that a comparison of typewritten letters in issue with the work done by a certain typewriting machine in the town where the alleged writer resided, indicated, because of defects in type and the alignment thereof, that the letters were written on the machine in question, is competent as tending to show that they were written by the alleged writer. (p. 857.)

**EVIDENCE—Contents of Letters.**—If it is claimed that certain letters were written by a party to the action, and he is notified to produce them, but fails to do so, evidence by the writer of their contents is admissible. (p. 858.)

**EVIDENCE—Handwriting—Unsigned Typewritten Letters.**—A witness who has seen a person write but once is competent to testify that the address on an envelope containing an unsigned typewritten letter is in the handwriting of such person. (p. 858.)

S. A. King, for the appellant.

M. A. Breeden, attorney general, and D. D. Houtz, district attorney, for the state.

<sup>443</sup> McCARTY, J. The defendant was convicted of the crime of adultery alleged to have been committed on June 18, 1904, at Provo, Utah, with one Delia Nance, an unmarried woman, and was sentenced therefor to a term in the penitentiary. The record <sup>444</sup> shows that the case was set for trial for December 5, 1904, but on motion of the district attorney, a continuance was granted until December 21, 1904. Upon the case being called for trial on the last-mentioned date the defendant made a motion, supported by affidavit, for a continuance on the ground that three of his witnesses were absent from the state. The court denied the motion, and a trial was had, which resulted in a disagreement of the jury. The case was, thereupon, immediately set

for trial January 9, 1905. When the case was called for trial on said date, the defendant again moved for a continuance on the ground that his three witnesses were still absent from the state, and that he could not safely proceed to trial without them. The court overruled the motion and the trial was proceeded with. On January 13, 1905, a verdict of guilty was rendered. A motion for a new trial having been made and overruled, defendant appeals to this court.

The action of the court in denying defendant's motion for a continuance is now assigned as error. In support of the motion defendant filed an affidavit in which he, in substance, alleges he is informed that all three of the witnesses therein named are temporarily absent from the state; that one of the witnesses, Alto Carter, was in Colorado; that affiant (defendant), immediately upon the cause being set for trial (December 23, 1904, sixteen days before the case was called for trial), caused a subpoena to be issued for said witness, but that the "time was so short that it was impossible for this affiant to obtain the presence of said witness at this term of court, notwithstanding the fact that said witness has expressed a willingness to be present in court and testify in his behalf." The affidavit then proceeds to recite what affiant expected to prove by the absent witness. It does not appear, however, that defendant communicated or attempted to communicate with the witness, notwithstanding he was advised of her whereabouts and that she had expressed a willingness to be present at the trial and testify. Nor does it appear that any effort was made to procure her attendance. Neither does the affiant state facts tending to show that there was any probability that this, or either of the other two absent witnesses, <sup>445</sup> would be present at the then next ensuing term of court, or that there was any probability that the evidence of these witnesses could and would be procured within a reasonable time. The same lack of diligence is shown with respect to procuring the attendance of the other two absent witnesses as was shown in the case of Alto Carter. Under these circumstances it was not an abuse of discretion for the court to deny the motion for a continuance: 1 Spelling on New Trial and Appellate Procedure, 137-140.

Delia Nance, the woman with whom it is alleged defendant committed the crime of which he stands convicted, was

called as a witness and testified that defendant was criminally intimate with her on June 8, 1904, at Provo, Utah, and that, as a result of their criminal conduct, she became pregnant; that defendant, after he was arrested for the crime, prevailed upon her to go to her home in Colorado in order to avoid testifying against him; that on the night of September 5, 1904, the defendant took her to Springville in a buggy, at which point he gave her money, and she took the train for Colorado; that it was understood before they parted that defendant would ship her trunk to her later on; that soon after arriving at her destination in Colorado she received, through the United States mail, an unsigned typewritten letter postmarked at Provo, Utah; that she had seen the defendant write, and that the address on the envelope was in his handwriting; that soon after the receipt of this letter she wrote a letter to defendant, deposited the same in the post-office, postage prepaid, and addressed to him at Provo, Utah, and stated to him in the letter that she wanted her trunk and if he didn't send it, she would return to Provo and get it, and that she made inquiries about the criminal case pending against defendant; that soon thereafter she received another unsigned typewritten letter postmarked Provo, Utah, which was introduced in evidence, and, in part, states: "Your trunk will be there in a few days, so you need not worry about that. . . . There hasn't been anything done yet, and won't if you don't come back for a while. Of course, after this is settled in court, it would be all right for you to come." 446 She also testified that she wrote several other letters to the defendant, deposited the same in the postoffice, postage prepaid, and addressed to him at Provo, Utah, in which she discussed their relations and trouble, the contents of which letters it is unnecessary to here set out in detail, and that in due course of mail she received unsigned letters postmarked Provo, Utah, which were introduced in evidence and in which the subject matter of her own letters was discussed; that one of the letters and the address on the envelope in which it came she recognized as being in the handwriting of defendant. A demand was made by the state on defendant to produce the letters alleged to have been written to him by the prosecutrix, but he denied having written any letters to her or of having received any from her. The court thereupon permitted the witness to testify

to the contents of the letters which she claimed were written by her to defendant. E. H. Holt, who was shown to be an expert on typewriting and familiar with the mechanism of typewriting machines, was called as a witness by the state, and, over defendant's objections, testified that, in his opinion, the affidavits sworn to by defendant and filed in the case in support of his motions for continuance, and the typewritten letters received by Delia Nance, hereinbefore referred to, and the addresses on some of the envelopes, in which the letters were posted, were written on the same typewriter. He testified, and his evidence is not disputed, that the letters and affidavits showed that the type used in printing them was of the same class and size, that certain letters (type) were defective, broken and out of repair, that certain other letters were out of alignment, and the spacing between certain letters was too great; that those peculiarities and defects appeared in the affidavits and typewritten letters and the addresses referred to which were typewritten; that he examined twenty-four typewriting machines in Provo City, one of which had the same defective type which made lettering, lining, and spacing in exact conformity with the peculiarities in these respects of the affidavits, letters, and addresses on the envelopes. He also testified, that, while it might be possible for two machines out of repair to have<sup>447</sup> precisely the same defects and to produce the same faulty printing in every respect that characterized the letters and affidavits mentioned, such a thing or coincidence is not at all probable.

It is now urged that the court erred in permitting Delia Nance, who claimed to have seen the defendant write but once, to testify that the letter written by hand which she claimed was received by her, and the address on the envelope in which it came, was in the defendant's handwriting. The rule is well settled that writing may be proved by evidence of a witness who has seen the person write. In 1 Greenleaf on Evidence, 577, it is said: "It is held sufficient for this purpose that the witness has seen him write but once, and then only his name. The proof in such case may be very light, but the jury will be permitted to weigh it."

In 2 Jones on Evidence, section 559, the author says: "But whatever degree of weight his testimony may deserve, which is a question exclusively for the jury, it is an established rule



that if one has seen the person write, he will be competent to speak as to his handwriting; and this is true, although the impression on the witness may be faint and inaccurate. Thus, the testimony has been admitted although the witness has not seen the person write for many years before the trial, and although he has only seen the person write on a single occasion, and even though he only saw the person write his name, or even his surname." And again: "It is not necessary that the witness should be an expert. These are matters affecting not the admissibility, but the weight of such testimony."

McKelvey, in his work on Evidence, page 360, says: "It has from early times been settled that no great degree of familiarity with handwriting is required to render a witness competent to give an opinion. If he has seen the person write a single time, it has generally been held sufficient": *Hammond v. Varian*, 54 N. Y. 398; *McNair v. Commonwealth*, 26 Pa. 388; *Rideout v. Newton*, 17 N. H. 71; *Pepper v. Barnett*, 22 Gratt. 405; *Keith v. Lothrop*, 10 Cush. 453; *Hogkins v. Meguire*, 35 Me. 78; *Edelen v. Gough*, 8 Gill (Md.), 87, 17 Cyc. 157.

<sup>448</sup> Appellant's next assignment is that the court erred in permitting witness Holt to testify with respect to the letters and affidavits referred to having been written on a certain typewriting machine then in use in Provo, Utah, the town in which defendant was residing at the time the letters were written and affidavits made. While it is true that this evidence, standing alone, did not prove that defendant wrote the letters, yet the state was entitled to have it submitted to the jury as a circumstance tending to show, when considered in connection with other facts and circumstances in the case, that the letters were written at the same town where they purported to have been posted, and in which the record shows defendant resided, and thereby tending to establish a link in the chain of evidence necessary to connect the defendant with the writing and sending of the letters.

Appellant's next complaint is that the court erred, first, in permitting Delia Nance to testify to the contents of the letters she claimed to have written to defendant from Colorado; and, second, by permitting the state to introduce in evidence the unsigned letters which she claimed to have received through the mails in Colorado purporting to be in answer to

the letters which she claimed to have written to the defendant. The state having made a demand on the defendant to produce the letters in question, and he having failed to do so, it was proper for the state to introduce testimony of their contents. Nor do we think the court erred in permitting the state to introduce in evidence the unsigned letters received by her which were posted at Provo, Utah. The contents of these letters, as shown by the record, related to and were strictly confined to matters of an incriminating character against defendant which were peculiarly within his knowledge and concerning which the prosecutrix claimed to have written him from Colorado, and about which she testified they had talked over together before she went to Colorado. Under these circumstances, and in view of her testimony that she identified one of the letters which was not typewritten as being in the handwriting of defendant, the contents of which were concerning matters directly connected with the <sup>449</sup> subject matter of the correspondence, we think it was proper to resort to and read in evidence the contents of the letters as tending, when considered in connection with the contents of the letters which Delia Nance claimed to have written to defendant, to prove their genuineness and that they were written by him: 3 Wigmore on Evidence, 2149, 2153; Singleton v. Bremar, Harp. (S. C.) 201.

We find no reversible error in the record. The judgment is therefore affirmed.

Bartch, C. J., and Straup, J., concur.

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*It is Within the Province of the Court to hold a witness competent to testify as to the genuineness of handwriting, on the ground of familiarity with it, though the witness has not seen the alleged writer later than thirty-two years before the trial, and then had only seen him write two or three times. The jury, however, are the judges of the weight to which such evidence is entitled: Wilson v. Van Lee, 127 Pa. 371, 14 Am. St. Rep. 854.*

## LARSEN v. GASBERG.

[30 Utah, 470, 86 Pac. 412.]

**JUDGMENTS—Res Judicata—Parties.**—If a judgment is rendered at a time when the judgment debtor has title to certain land and thereupon becomes a lien thereon, after which, and before execution sale thereunder, suit is commenced against the judgment debtor to cancel the deed under which he holds the land for fraud, notice of lis pendens is given, and judgment rendered canceling such deed but without making the first judgment creditor a party to the action, and he subsequently purchases the land at execution sale under his judgment, he is not bound by the judgment canceling such deed, so as to relieve the judgment debtor's grantor, in a suit to recover the land from such judgment creditor, from the necessity of proving that such deed was obtained by fraud. (p. 861.)

O. W. Powers and R. H. Jones, for the appellant.

B. H. Jones and N. Jensen, for the respondent.

<sup>472</sup> McCARTY, J. This is an action to quiet title to a city lot and a five-acre tract of land situate in Box Elder county, Utah. Plaintiff, in her complaint filed September 13, 1904, claims title in fee to the property, and alleges that defendant claims an estate or interest therein adverse to her, and further alleges that defendant has no estate, title, or interest whatever in or to said land or any part thereof, and asks that defendant be required to set forth the nature of his claim. The defendant answered denying that plaintiff had any interest in the property except a life estate, and set up title in himself subject to the <sup>473</sup> life estate mentioned. A trial was had and the court found the issues in favor of the plaintiff and entered judgment quieting her title to the premises. To reverse the judgment, defendant prosecutes this appeal.

It appears from the record that on June 15, 1897, plaintiff, Mrs. Larsen, in whom was the legal title to the premises mentioned, deeded the same to J. B. Carrington, reserving to herself and husband a life estate in the property so conveyed. It is also provided in the deed that in case the grantee, J. B. Carrington, shall die before the grantors, then the premises conveyed shall revert back to the grantor. On October 28, 1897, J. B. Carrington and his wife, Katherine Carrington, deeded the property in question to Clara Carrington, their minor daughter. The consideration mentioned in the deed is

"the sum of one dollar and love and affection." On April 2, 1898, the defendant Gasberg, and one Charles Miller obtained a judgment against J. B. Carrington, in the district court of Box Elder county, Utah, for seven hundred and forty dollars and five cents on an indebtedness which antedated the execution of the deed from J. B. Carrington and Katherine Carrington to Clara Carrington. An execution was duly issued on the judgment thus obtained, and all the right, title and interest which J. B. Carrington had in and to the property in question was levied upon, duly advertised, and sold at public sale August 20, 1898, the same being purchased by Miller and Gasberg, judgment creditors, in said suit. On August 19, 1898, the day before the interest of J. B. Carrington in and to said premises was sold as aforesaid, Jens Larsen and Christena Larsen commenced an action in the district court of Box Elder county, Utah, against J. B. Carrington, and Clara Carrington to have the deed to said premises, which was executed by Christena J. Larsen to J. B. Carrington, June 1, 1897, delivered up and canceled on the ground that the same was obtained through fraud and without any consideration; also to have the deed from J. B. Carrington and Katherine Carrington to Clara Carrington canceled on the ground that she took said deed with knowledge of the facts constituting the alleged fraud and failure of consideration. Gasberg, who had, in the meantime, acquired Miller's <sup>474</sup> interest in and to the property, was not made a party to the action. Lis pendens giving notice of the commencement of the action "to cancel and set aside the deeds" was duly filed and recorded August 19, 1898, one day prior to the sale of the premises by the sheriff to Gasberg and Miller, as hereinbefore stated. A trial was had of that case, and the court made its findings and entered judgment, wherein it is held that the deed from Christena J. Larsen to J. B. Carrington and the deed from J. B. Carrington and Katherine Carrington to Clara Carrington were "null and void," and that they be canceled and set aside.

Plaintiff introduced the deed from herself to J. B. Carrington and the deed from J. B. Carrington and Katherine Carrington in evidence, together with the judgment-roll in the case above mentioned, and rested. No evidence was offered of the facts upon which it is claimed that the deed from plaintiff to J. B. Carrington was obtained through

fraud and without consideration, other than the judgment-roll mentioned. While there was no finding to that effect, the court evidently proceeded and decided the case upon the theory contended for by respondent in her brief, namely, that whatever interest or color of title Carrington had in and to the premises was extinguished by the judgment in that case, and as Gasberg claims title through Carrington he, too, is bound thereby. When the judgment in favor of Miller and Gasberg, and against Carrington, was entered and docketed (April 2, 1898), it became a lien upon whatever interest or estate Carrington had in the property in question: Rev. Stats. 1898, sec. 3198. This judgment lien attached to Carrington's interest long prior to the time of the filing of the *lis pendens* of the suit by Jens Larsen and Christena Larsen against the Carringtons to have the deeds mentioned delivered up and canceled. Therefore, Miller and Gasberg were necessary parties to the action, and not having been made parties they are not concluded by the judgment: 21 Am. & Eng. Ency. of Law, 2d ed., 648.

When Miller and Gasberg obtained their judgment the record title to the premises in question was in Carrington subject only to a joint life estate in favor of plaintiff and her <sup>475</sup> husband. There was nothing on the face of the deed of conveyance which purported to vest in Carrington an estate in the property which indicated or suggested that it was obtained through fraud and without consideration. Therefore, when plaintiff put his deed in evidence, which showed that the fee to the property was in Carrington, it was incumbent upon her, if she wished to avoid its effect upon the ground that it was obtained through fraud and without consideration, to establish these facts by competent evidence, and give the defendant an opportunity to try the issue of fraud. In other words, the defendant was entitled to his day in court, and his rights, whatever they were, could not be extinguished by a judgment in an action which was commenced long after the judgment lien attached by virtue of which the property was levied upon and sold, and to which action he was not made a party.

The judgment is reversed, with directions to the lower court to grant a new trial. Costs of this appeal to be taxed against respondent.

Bartch, C. J., and Straup, J., concur.

*Only the Parties to a Judgment* and those in privity with them are concluded thereby: *State v. Branch*, 134 Mo. 592, 56 Am. St. Rep. 533; *Fuller v. Metropolitan etc. Ins. Co.*, 68 Conn. 55, 57 Am. St. Rep. 54; *Nickum v. Burkhardt*, 30 Or. 464, 60 Am. St. Rep. 822; *Cope v. Payne*, 111 Tenn. 128, 102 Am. St. Rep. 746; *Brack v. Boyd*, 211 Ill. 290, 103 Am. St. Rep. 200.

*The Law of Lis Pendens* is the subject of a note to *Stout v. Philippi Mfg. Co.*, 56 Am. St. Rep. 853.

### MANTI CITY SAVINGS BANK v. PETERSON.

[30 Utah, 475, 86 Pac. 414.]

**REPLEVIN—Allegation of Ownership.**—In an action to recover personal property the complaint must show the ultimate fact that the plaintiff was the owner or entitled to the possession of the property at the time of the commencement of the suit, and it is not sufficient to merely aver that he was the owner or entitled to the possession at some period, even one day, prior to that time. (p. 863.)

**BAILMENT Arising Under Case.**—A lease of sheep under a contract that they shall be branded with the lessee's mark and mingled with sheep of his own bearing the same mark, the lessor to be paid a certain amount of wool per sheep and a certain rate of increase per year, is a bailment and not a sale. (p. 864.)

J. M. Cherry, E. Hansen and J. L. Rawlins, for the appellant.

W. D. Livingston and A. Brown, for the respondent.

470 **STRAUP, J.** 1. The respondent, plaintiff below, brought this action against defendants to recover the possession of sheep. Upon findings made by the trial court judgment was rendered in favor of plaintiff. The first assignment of errors assailed the sufficiency of the complaint. It was alleged in the complaint "that the plaintiff on the second day of September, 1903, was entitled to the possession" of the sheep; that on that day a demand for the possession was made by the plaintiff, but the defendants refused to deliver. The complaint was filed September 3, 1903. The defendants' demurrer to the complaint for want of facts and their objection on the same ground to the introduction of evidence, were overruled. It is contended that the complaint is sufficient because it does not allege that the plaintiff was the owner or entitled to the possession of the property at the time the action was commenced. The contention must be sustained.

<sup>477</sup> In a suit to recover personal property the complaint must show the ultimate fact that the plaintiff was the owner or entitled to the possession at the time of the commencement of the action; and it is not sufficient to merely aver that he was the owner or entitled to possession at some period prior to that time: *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750; *Affierbach v. McGovern*, 79 Cal. 269, 21 Pac. 837; *Masterson v. Clark* (Cal.), 41 Pac. 796; *Holly v. Heiskell*, 112 Cal. 174, 44 Pac. 466; *Kimball Co. v. Redfield*, 33 Or. 292, 54 Pac. 216; *Cobbey on Replevin*, secs. 97, 98. This principle of law is not disputed by the respondent, but it is claimed that the allegation of right of possession on the second day of September, the complaint having been filed on the third, is a sufficient allegation, and equivalent to the one that the plaintiff was entitled to the possession at the commencement of the action. This claim is answered adversely to the respondent by the court in *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750; where, in speaking of the difference between that case and the case of *Affierbach v. McGovern*, 79 Cal. 269, 21 Pac. 837, it said: "The alleged ownership and right of possession in that case was long before the suit was brought, while here it is placed at a date only two days prior to the commencement of the action; but this does not alter the principle, which is that the plaintiff must show his ownership and right to possession at the time the action is commenced."

No such averment having been made, the court erred in overruling the demurrer and objection.

2. Inasmuch as the case must be remanded for a new trial, and that other points presented may again be raised on retrial, it is proper that we express our opinion on them. It is urged that the defendants' motion for nonsuit ought to have been granted. That claim is made, principally, on the ground that the property was not sufficiently identified, and that the plaintiff had not shown ownership nor right of possession of the property. In December, 1902, one Peter Thompson, to secure an indebtedness, gave the plaintiff a chattel mortgage on sixteen hundred head of sheep, and their increase marked "with two upper bits in the left ear, and an upper bit in the right ear, branded with 'T' on the back." By a provision in the mortgage, <sup>478</sup> on default of payments, the plaintiff was given the right to take the property into his

possession. Such default was made August 1, 1903. At about that time the mortgagor died at his sheep camp, and in the possession of about two thousand nine hundred head of sheep, of which about two thousand one hundred and sixty-three head were marked and branded as in the mortgage described. After the death of the mortgagor, and on August 2d, or 3d, the plaintiff engaged a person, who was acquainted with the deceased's sheep, to go to the camp and see "if everything was all right." On his arrival at the camp he found the sheep in charge of two men and boys. He hired one of them to look after the sheep until the plaintiff made other arrangements. On the 4th or 5th of August another person was employed by plaintiff to take the sheep with Peter Thompson's mark on them, and as described in the mortgage. In his effort to do so the person in charge refused to let him have them. Thereafter the sheep so marked were taken by the plaintiff on its writ. It was also shown that such mark was Peter Thompson's mark, and that for a number of years prior to his death he was in the sheep business, and each year had in his possession upward of two thousand sheep marked as in the mortgage described. The note and mortgage, of course, were admitted in evidence and proof made of nonpayment and default. We think this evidence, *prima facie*, at least, tended to show that the deceased was the owner of the sheep at the time of the execution of the mortgage, and sufficiently identified the property described in the mortgage. The court, therefore, properly overruled the motion.

3. That defendants introduced evidence tending to show that prior to the execution of the mortgage they had leased sheep to Peter Thompson, and which were of the herd mortgaged by him to the plaintiff. Neils Thompson, one of the defendants, testified: "I am a brother of Peter Thompson. I was acquainted with the band of sheep in Peter Thompson's possession in 1902. I had nine hundred and fifteen head of sheep in that band in 1902. I first delivered him something over one hundred head in 1896, upon the terms that he was to run them and give me ten per cent increase and one and one-quarter pounds of wool <sup>475</sup> per head per year, and at the end of the year return my sheep or renew the contract. The next year I left the increase and added more sheep and renewed the contract. In 1897 I had two



hundred and sixty-six head. I renewed the contract each year. In 1898 I had two hundred and ninety-two head. In 1899 I bought one hundred head from C. J. Fisher and added to my contract, making four hundred and twenty-one altogether. In 1900 I bought more sheep and turned them in, making a total of seven hundred and fifty-one. In 1901 I had eight hundred and thirty-two, and in 1902 I had nine hundred and fifteen head in the herd on those terms. I had no written contract. We settled up at the end of each year, and Peter Thompson acknowledged the number. In September, 1903, I had, with the increase added, one thousand and six sheep in his herd belonging to me. The sheep were marked with Peter Thompson's mark. I consented to them being marked that way. I settled with Peter Thompson in 1902, and we agreed on nine hundred and fifteen head, and the contract was renewed for another year upon the same terms."

In connection with the testimony of other defendants with respect to their having leased sheep to Peter Thompson, the following memoranda, executed by him, were admitted in evidence:

"Ephraim, Utah, October 1, 1901.

"This certifies that I have 489 2-10 sheep on shares belonging to Albert Thompson, for which I agree to pay one and one-half pounds of wool and ten sheep increase per hundred, the sheep when delivered to be at or near Ephraim, and to be an average of my herd.

"PETER THOMPSON."

"Ephraim, Utah, October 1, 1901.

"This certifies that I have leased and received of C. J. Fisher, of Ephraim, Utah, 387 head of stock sheep for one year, and agree to pay to said C. J. Fisher ten head of sheep increase on each one hundred, also one and one-half pounds of wool on each head for the lease and use of said sheep. The said 387 sheep, together with the ten on each one hundred increase, when returned to said C. J. Fisher, to be an average of all the sheep in my herd, and to be received by him or delivered to him within thirty miles of Ephraim, Utah, on October 1, 1902. The said sheep to be separated from my herd <sup>480</sup> in the presence of said C. J. Fisher, or representatives duly authorized by him to receive them.

"PETER THOMPSON."

Similar evidence of other defendants was also admitted. Book entries made by the deceased and in his handwriting, showing accounts and transactions between him and the defendants, with respect to the leasing of sheep, were also admitted. The defendants testified that the sheep leased by them to the deceased were marked with Peter Thompson's mark with their consent; that it was the custom to mark leased sheep with the lessee's mark; and that they were marked in that way so they could be identified. After the testimony of the defendants with respect to their having leased sheep to the deceased, and of their ownership, had been received, on plaintiff's motion, the court ruled it out. In this ruling we think the court erred. The respondent seeks principally to uphold the ruling because of the fact that the defendants' sheep, with the consent of the parties, were marked with Peter Thompson's mark, and were commingled with sheep of his own having the same mark, and that, therefore, the sheep claimed to have been leased by the defendants could not be distinguished from the sheep owned by the deceased, and from the nature of the contracts the identical sheep leased were not to be returned to them; and therefore, the transactions must be regarded as sales or another passing of title, and not as bailments or as creating a tenancy in common. Under the holdings of this court the claim is not tenable: *Wetzel v. Deseret Nat. Bank*, 30 Utah, 62, 83 Pac. 570; *Turnbow v. Beckstead*, 25 Utah, 468, 71 Pac. 1062; *Rich v. Utah C. & S. Bank*, 30 Utah, 334, 84 Pac. 1105. The court should not have stricken the testimony, but should have considered it and made findings with respect thereto.

The judgment of the court below is reversed, plaintiff given leave to amend its complaint, and a new trial granted. Costs of the appeal are to be taxed against the respondent.

McCarty, J., concurs.

Bartch, C. J., concurs in the judgment.

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*When Replevin is Sustainable* is the subject of a note to *Sinnott v. Feiosck*, 80 Am. St. Rep. 741.

*The Distinction Between a Sale and a Bailment* is discussed in the notes to *Fleet v. Hertz*, 94 Am. St. Rep. 209; *Andrews v. Savings Bank*, 46 Am. St. Rep. 295. A lease of personal property for a term of years, in consideration of a fixed sum, to be paid in monthly installments, containing an agreement, in case of default, to execute a

bill of sale of the property, constitutes the contract a bailment, and not a conditional sale: *Lippincott v. Scott*, 198 Pa. 283, 82 Am. St. Rep. 801.

*The Distinction Between Conditional Sales and Chattel Mortgages* is discussed in the recent cases of *Studebaker Brothers Co. v. Mau*, 13 Wyo. 358, 110 Am. St. Rep. 1001; *Freed Furniture Co. v. Sorensen*, 28 Utah, 419, 107 Am. St. Rep. 731; note to *Fleet v. Hertz*, 94 Am. St. Rep. 234.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**WEST VIRGINIA.**

**KOBLEGARD v. HALE.**

[60 W. Va. 37, 53 S. E. 793.]

**SPITE FENCES—Light and Air.**—One person has a right to build a fence on his own land as high as he pleases, notwithstanding it obstructs his neighbor's light and air coming laterally from such adjoining land. (p. 870.)

W. W. Brannon, for the appellants.

R. L. Bland, for the appellees.

**37** COX, J. The appellees, trustees of the Methodist Episcopal Church of Weston, West Virginia, filed their bill in the circuit court of Lewis county against appellants, Susan Hale and A. C. Hale, her husband, for an injunction to remove and prevent the maintenance of, a plank fence twelve feet high along the line of the lot of said Susan Hale, which fronts on Third street in the town of Weston and adjoins the piece of land or lot, fronting on the same street, upon which the congregation of said M. E. Church has in course of construction **38** a beautiful and costly church edifice, to be used as a place of religious worship.

The bill alleges in substance: That the fence, erected and being erected, is a high, rough and ugly plank fence: that immense unhewn posts have been planted in the ground; that the fence has been erected alongside of the large church windows, being ten in number, reaching nearly, if not entirely, to the top of said windows; that after the work of building the church was commenced, the defendant A. C. Hale became much incensed, and declared that the church would have the effect to cut off his light, and that the same was built

in order to spite him, but that he would "get even" with the church by building a high fence in front of the windows on the east side of the church building, that he would "shut off their light," and would paint the proposed fence black on the side next to the church; that, pursuant to such threats, and from motives of pure malice and spite, and to annoy, harass and damage the congregation of the church, the fence was commenced and erected; that the fence is unnecessary, and serves no good or proper purpose to the defendants; that the effect of the erection and maintenance of the fence is to shut out the light and air from the said church building on its eastern side, where such light and air are absolutely necessary and essential to the peace, comfort and health of the members of the congregation of the church and others who may attend there for the purpose of engaging in religious worship. The bill contains many other allegations, but we deem it unnecessary to repeat them here. The bill does not allege that the fence was built on the church lot, or that it was not wholly on the lot of appellant Susan Hale, and does not allege that the side of the fence next to the church was painted black.

The appellees do not allege that they, or those for whom they hold the church property, have any interest in the Hale lot, or in the light and air therefrom, other than such rights as they may be entitled to as adjoining land owners.

Upon presentation of the bill, in vacation, to the judge of the circuit court, a preliminary injunction was awarded preventing further work toward the completion of the fence. Afterward, appellants filed their demurrer to the bill, and also their answer, and moved to dissolve the injunction, and ~~so~~ appellees moved for a mandatory injunction. The cause was heard in term on the ninth day of March, 1905, in the circuit court of said county, and a decree was entered overruling the demurrer and adjudicating that the fence, so far as it operated as an obstruction of light and air in and about the building of appellees, constituted a nuisance, and awarding an injunction against the maintenance, and to compel the removal, of the fence. From this decree Susan Hale and A. C. Hale appeal.

The first question is as to the sufficiency of the bill upon demurrer, considering the allegations of the bill as true. By the bill, the appellees must show their right to maintain the

suit. What legal right of the appellees, or of those for whom they hold, has been invaded? What legal right has an owner of one lot or piece of land to the light and air unobstructed, coming laterally to his land or building from his neighbor's land, which the neighbor is bound to respect? The common law of England touching ancient lights is not, and never has been, in force in this state: Code, c. 79, sec. 13; *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629; *Cunningham v. Dorsey*, 3 W. Va. 293. The doctrine of ancient lights is not relied on to afford appellees relief. Outside of the doctrine of ancient lights, under the common law, it seems that the owner of land has no legal right, in the absence of an easement, to the light and air unobstructed from the adjoining land. At common law, one has the right to build a fence on his own land as high as he pleases, notwithstanding it obstructs his neighbor's light and air. Judge Holmes, then a member of the supreme court of Massachusetts, now a justice of the supreme court of the United States, delivering the opinion of the Massachusetts court in the case of *Rideout v. Knox*, 148 Mass. 368, 12 Am. St. Rep. 560, 19 N. E. 390, 2 L. R. A. 81, said: "At common law, a man has a right to build a fence on his own land as high as he pleases, however much it may obstruct his neighbor's light and air. And the limit up to which a man may impair his neighbor's enjoyment of his estate by the mode of using his own is fixed by external standards only: *Walker v. Cronin*, 107 Mass. 555; *Chatfield v. Wilson*, 28 Vt. 49; *Phelps v. Knowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Frazier v. Brown*, 12 Ohio St. 294; *Martin, B.*, in *Rawstron v. Taylor*, 11 Ex. 369; *Benjamin v. Wheeler*, 8 Gray, 409."

<sup>40</sup> "As has been seen, a property owner has no right to the uninterrupted access of light and air to his premises from and over the adjoining land of another, unless such right has been acquired by grant or prescription. It follows that an obstruction of these elements by the adjoining owner, by building on his own land, is not a legal injury, and is not actionable": 19 Am. & Eng. Ency. of Law, 122.

"According to the received view of the common law, the erection of a fence upon one's own land is not an actionable injury to one's neighbor, although the erection may deprive him of light and air and may be dictated by motives of ill-will": 12 Am. & Eng. Ency. of Law, 1058.

"The making of openings or windows in a house or wall abutting on or overlooking adjoining land confers no right to the access of light and air over the adjoining land which the owner thereof is bound to respect. The doctrine of the common law is, that an adjoining owner may deprive his neighbor of the light coming laterally over his land, by the erection of a wall or other structure thereon, within the period of prescription, though he does so for the purpose of darkening the windows and obstructing the passage of light and air; and, except where this rule has been changed by statute, there is no legal injury by such an obstruction": 1 Cyc. 788. To support that doctrine, cases decided by courts of last resort are there cited from the states of Alabama, California, Delaware, Georgia, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Mississippi, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Texas, Vermont, and West Virginia, and from England; the case cited from West Virginia being *Cunningham v. Dorsey*, 3 W. Va. 293. In the same work, at page 789, it is said: "If an erection which deprives the adjoining owner of light and air is lawful, it is not per se a nuisance, and the law will not inquire into the motive with which the erection was made": See, also, 2 Washburn on Real Property, sec. 1278.

In the case of *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177, it is said: "The case is not like annoying a neighbor by means of causing smoke, gas, noisome smells or noises to enter his premises, thereby causing injury. In such cases something is produced on one's own premises and conveyed to the premises of another; but in this case nothing is sent, but the light and <sup>41</sup> air are withheld. A man may be compelled to keep his gas, smoke, odors and noises at home, but he cannot be compelled to send his light and air abroad."

There are many uses of land by the owner which may invade the rights of others to their injury, and which constitute private nuisances; but the common law does not recognize the case here presented as one of them. It is not claimed that, by virtue of any statute, grant or easement, appellees are entitled to maintain this bill against the obstruction of light and air coming laterally from the adjoining lot. We do not think that the motive or intent of appellants in building the fence is material, in determining what right appellees

have in the light and air the obstruction of which they seek to enjoin.

The case of *Medford v. Levy*, 31 W. Va. 649, 13 Am. St. Rep. 887, 8 S. E. 302, 2 L. R. A. 368, is relied upon to support appellees' contention. We think it does not apply. That was not a case for obstructing light or air. It was a bill for the prevention of offensive odors and many other acts, some of which at least were considered to be invasions of the complainants' rights in that case. The syllabus of the case must, of course, be read in the light of the opinion. We think that it is clear, under the authorities, that the appellees have failed to show, by the allegations of the bill, any right to maintain this suit. The only object of this bill is an injunction against the maintenance, and to compel the removal of the said fence.

We must, for the reasons stated, hold the bill insufficient in law, reverse the decree complained of, sustain the demurrer, and dismiss the bill.

BRANNON, J. Counsel for the church claims that the pith of the case on that side, its strength, lies in the fact that Hale erected the fence from malice and spite.

As Hale owned the property, she had the legal right to build the fence, even though the intent were that ascribed to her. Authorities given in *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895, 40 S. E. 591, 56 L. R. A. 804, will go far to sustain this position. Justice Brown, in *Camfield v. United States*, 167 U. S. 518, 17 Sup. Ct. Rep. 864, 42 L. ed. 260, whilst <sup>42</sup> expressing some condemnation of the law, was compelled to say: "It is true that a man may build a fence upon his own land as high as he pleases, even though it obstructs his neighbor's lights, and the weight of authority is that his motives in so doing cannot be inquired into, even though the fence be built expressly to annoy and spite his neighbor; and that in this particular, the law takes no account of the selfishness or malevolence of individual proprietors: *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461; *Chatfield v. Wilson*, 28 Vt. 49; *Frazier v. Brown*, 12 Ohio St. 294; *Pickard v. Collins*, 23 Barb. 444; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Walker v. Cronin*, 107 Mass. 555; although there are many strong intimations to the contrary." Much authority sustains this: *Metzer v. Hochrein*, 107 Wis. 267, 81 Am. St. Rep. 841, 83



N. W. 308, 50 L. R. A. 305; Kuzniak v. Kozminski, 107 Mich. 444, 61 Am. St. Rep. 344, 65 N. W. 275; Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177. If you decide otherwise you detract from the right of property. "The motives of one who exercises a legal right cannot be inquired into": Letts v. Kesler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177, 3 Am. & Eng. Dec. in Eq. 579.

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*The Erection of Spite Fences*, however reprehensible the practice may be, seems lawful, except in those states where the legislature has declared otherwise: Horan v. Byrnes, 72 N. H. 93, 101 Am. St. Rep. 670, and cases cited in the cross-reference note thereto.

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## DEEPWATER RAILWAY COMPANY v. D. H. MOTTER & CO.

[60 W. Va. 55, 53 S. E. 705.]

**GARNISHMENT—Injunction Because of.**—An action of assumpsit by a contractor against a railroad company to recover for construction work under a contract cannot be enjoined at the request of the company merely for the reason that a number of the creditors of such contractor have garnished such company. (p. 874.)

**EQUITY—Jurisdiction for One Purpose, Extending to Others.**—It is not an infallible rule that equity, having taken jurisdiction for one purpose, will dispose of all matters in the case, though some be of legal cognizance. (p. 876.)

**EQUITY—Jurisdiction—Retention of.**—If the remedy at law is more appropriate than the remedy in equity, or the verdict of a jury is indispensable to the relief sought, equity, though having entertained jurisdiction for one purpose, the jurisdiction will be declined, or if retained will be so subject to a trial at law, and the facts of each case must determine as to this. (p. 876.)

A. N. Campbell and Brown, Jackson & Knight, for the appellants.

Simms & Enslow, for the appellees.

<sup>55</sup> BRANNON, J. Under a contract with the Deepwater Railway Company, D. H. Motter & Co. did work in the construction of that company's road, and brought an action of assumpsit in the circuit court of Fayette county against said company for recovery of their demand, the amount of which and the right to any amount were in great dispute between them. A number of creditors of Motter & Co. brought divers suits before justices and in court against them, sued out attachments, and garnished the railroad company as a debtor

for such construction work of Motter & Co. In this condition of things the railroad company filed a bill in chancery <sup>56</sup> against Motter & Co. and those various creditors to enjoin said creditors from going on with their suits and proceedings in garnishment against said railroad company until a determination should be had, in the chancery suit, of the validity of the proceedings and demands of said creditors of Motter & Co. and their order and priority, and what sum was owing by the railroad company to Motter & Co. available for the payment of the creditors, and to enjoin Motter & Co. from prosecuting their action of assumpsit against the railroad company, and to settle the account between Motter & Co. and the railroad company and all matters in the case. An injunction was awarded, which was afterward dissolved, so far as it enjoined the prosecution of the action of assumpsit, and from this partial dissolution of the injunction the railroad company has appealed.

Clearly, the demand of Motter & Co. is legal in character. triable by a jury in a law court in the action of assumpsit. and under the constitution Motter & Co. are entitled to such trial, unless we can see some plain reason why equity should deprive them of it. As between the railroad company and Motter & Co., a law court can give adequate and full remedy by testing whether any amount is due to Motter & Co., and if so, how much. They have right to have that amount determined by verdict and judgment, as such judgment would be conclusive, not only between the railroad company and them, but as between Motter & Co. and their creditors as to the fund liable for debt: *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924. Say that the railroad company could sue the conflicting creditors in equity to settle their rights as to the fund in its hands (this is not decided), still that fact cannot disable Motter & Co. from sustaining a suit at law. The fact that these creditors on various claims are pursuing the railroad company is a matter between them, not between the company and Motter & Co., and cannot put it in the power of the company to exclude Motter & Co. from their proper chosen tribunal. It is this right of Motter & Co. to have their demand passed on by a jury that must be the dominant factor. We must not ignore that right. The law forum's relief, as between the company and Motter & Co., is full and

adequate to fix their rights. When we are met by the plea that it is not adequate between the company and the creditors<sup>57</sup> of Motter & Co., we answer that is another matter, and that the action of the circuit court leaves the injunction in force as to that.

Avoidance of multiplicity of suits cannot give equity jurisdiction to stop the action against Motter & Co. The many suits against them would not give them a place in equity, as we held in *National Tube Co. v. Smith*, 57 W. Va. 210, 110 Am. St. Rep. 771, 50 S. E. 717, 1 L. R. A., N. S., 195, and under *High on Injunction*, fourth edition, section 65, third edition, section 57, that "the fact of different suits having been brought, each having a distinct object, founded on distinct and separate grounds, brought by different persons, does not constitute such multiplicity of suits as to bring the case within the rule to warrant an injunction." But there being one fund in the railroad company's hands claimed by numerous conflicting creditors, I doubt the application of that law to prevent the company from assembling, in one injunction suit, those creditors; however, that cannot authorize the railroad company to shut out Motter & Co. from a jury trial (the court does not decide as to that), and as between the company and Motter & Co. all questions of amount, fraud in the contract, estoppel by reason of the contract's making the engineer's estimate final, can be heard at law. The case of *Nease v. Aetna Ins. Co.*, 32 W. Va. 283, 9 S. E. 233, is much relied upon by the railroad company. Jurisdiction in it was based on a statute. Besides, that was a suit by a sheriff holding several executions claimed to be liens on a fund in the hands of an insurance company, to which there was a conflicting claim by an assignee of the party who was the execution debtor and the insured party. The sheriff sued for the execution creditors to settle conflicting claims on a common fund. Creditors are not suing here. The insured was not suing the insurance company to recover his demand. There was no question as to injunction against a prosecution of an action at law. The injunction was to prevent payment of the fund to the insured party or his assignee until the conflicting claims could be adjudicated.

As to the argument that the law court cannot give full relief: It may not by way of trying numerous actions by

creditors against Motter & Co.; but it can give full relief between the railroad company and Motter & Co. The question of jurisdiction is between them.

<sup>58</sup> It is argued upon such cases as *Hotchkiss v. Fitzgerald* etc. Co., 41 W. Va. 357, 23 S. E. 576, that equity having jurisdiction for one purpose, disposes of all matters involved in the case, though some be of legal cognizance; that having jurisdiction to pass on the conflicting claims of creditors, it can pass on the matters involved between the railroad company and Motter & Co. The proposition, broadly stated in the books, is a valuable rule of equity, but not of universal application. It is true where the rights arise out of the same transaction; but here the rights between the railroad company and Motter & Co. arise out of the contract between them, whilst rights as between Motter & Co. and the creditors grow out of other contracts and transactions. The main point of litigation is between the company and Motter & Co. growing out of a given transaction having no relation to the rights of Motter & Co.'s creditors against them, the rights of those creditors against the company being merely incidental, the garnishments being given only as a reason for enjoining the action at law. The rule is not infallible. Should it be applied to deprive one of a jury trial in a matter to which a jury trial is peculiarly fit? In cases of discovery Story says: "If the proper relief be by an award of damages, which can be ascertained by a jury, there may be strong reason for declining the exercise of jurisdiction, since it is the appropriate function of a law court to superintend such trials. And in many other cases, where a question arises purely of matters of fact to be tried by a jury, and the relief is dependent upon that question, there is equal reason that the jurisdiction for relief should be declined. Thus, if a bill seek discovery of a contract for the sale of goods and chattels, or a wrongful conversion of goods, and the breach of the contract, or conversion of the goods, is properly remediable in damages, to be ascertained by a jury, the relief seems properly to belong to a court of law. . . . And thirdly, where the remedy at law is more appropriate than the remedy in equity, or the verdict of a jury is indispensable to the relief sought, the jurisdiction will be declined, or if retained, will be so subject to a trial at law": Story's *Equity*, secs. 72, 73. This doctrine is held in *Freer v. Davis*, 52 W. Va. 1, 94 Am. St. Rep. 895. <sup>41</sup>

S. E. 164, 59 L. R. A. 556. The Virginia court said that so far from the rule being inflexible, "where the remedy at law is more appropriate than in equity, <sup>59</sup> or where the verdict of a jury is proper, the jurisdiction will be declined, or if retained, will be held subject to a trial at law. It is impossible to lay down any general rule without running counter to some plain exception or well recognized modification." "The facts of each case must determine whether equity will go on and decree against all the parties, or leave the parties to their appropriate remedy at law": *Walters v. Farmers' Bank*, 76 Va. 12. I have taken for granted, for argument, that there is jurisdiction as to the creditors; but we do not decide it. I doubt whether under section 4, chapter 131 of the Code, the court could have the damages assessed by a jury, and therefore the allowance to proceed with the action was right, and we affirm the order.

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**EXCEPTION TO THE RULE THAT WHEN EQUITY ASSUMES JURISDICTION FOR ONE PURPOSE IT WILL RETAIN IT FOR ALL PURPOSES.**

- I. When the Particular Equitable Relief Demanded is Denied, 877.
- II. When the Pleadings, are not Broad Enough to Warrant General Relief, 880.
- III. When the Particular Equitable Relief Sought is a Mere Pretense for Changing the Forum, 880.
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- VI. In Case the Sole Ground of Equity Jurisdiction is Merely Ancillary to the Legal Remedy, 881.
- VII. In Case of Bills of Discovery, 881.

**I. When the Particular Equitable Relief Demanded is Denied.**

The rule that when equity takes jurisdiction for one purpose it will retain the cause for all purposes and administer complete relief has been denied application when the plaintiff's equity entirely fails: *Capen v. Leach*, 182 Mass. 175, 65 N. E. 63; *Whyte v. Builders' League*, 35 App. Div. 480, 54 N. Y. Supp. 822; *Dodd v. Home Mut. Life Ins. Co.*, 22 Or. 3, 28 Pac. 881, 29 Pac. 3; *Robinson v. Brooks*, 31 Wash. 60, 71 Pac. 721; *Horn v. Ludington*, 32 Wis. 73; *Smith v. Little*, 5 Biss. 490, Fed. Cas. No. 13,072; *Kessler v. Eusley Co.*, 123 Fed. 546. Thus, if the entire ground of equitable relief fails, the suit should not be retained to recover damages: *Clark v. Smith*, 90 App. Div. 411, 86 N. Y. Supp. 472; *Dakin v. Union Pac. Ry. Co.*, 5 Fed. 665.

"While it is true," to quote from a recent Illinois decision, "that a court of equity which has jurisdiction of a cause by reason of the

existence of some ground of equitable jurisdiction, for the purpose of doing complete justice between the parties, may, in addition to the equitable relief, afford relief of a character which in the first instance is obtainable only in a suit at law, still, to authorize relief of the latter character, some special and substantial ground of equitable jurisdiction must be alleged in the bill and proved upon the hearing. Mere statements in a bill upon which the chancery jurisdiction might be maintained, but which are not proved, will not authorize a decree upon such parts of the bill as, if standing alone, would not give the court jurisdiction": *Toledo etc. R. R. Co. v. St. Louis & R. R. Co.*, 208 Ill. 623, 70 N. E. 715.

If the complaint presents a purely equitable cause of action, and the plaintiff fails to prove any grounds of equitable relief, but instead a right to damages or some other legal relief, the court will not proceed to award the same: *Hawkes v. Dobbs*, 18 N. Y. Supp. 123. "Where the complaint is framed solely for equitable relief, and the action is tried as an action in equity, the court, on finding that the plaintiff is not entitled to any equitable relief, but that the facts would warrant an action for damages which he has not alleged or claimed, cannot order judgment for such damages": *Vincent v. Moriarity*, 52 N. Y. Supp. 519; *Wheelock v. Lee*, 74 N. Y. 495. However, where one brings an action on the equity side of the court for the purpose of obtaining some relief which that branch of the court alone is competent to render, and fails to establish his equitable demand, the action will not be dismissed, provided his allegations and proofs are sufficient to show that he is entitled to some legal relief: *Kinsey v. Bennett*, 31 S. C. 319, 15 S. E. 965. Equity having acquired jurisdiction of a cause for one purpose, although the relief sought is finally denied any relief, legal or equitable, justified by the pleadings and tending to end litigation between the parties, will be granted: *Evans v. Kelley*, 49 W. Va. 181, 38 S. E. 497.

While it is true, as a general rule, that one who brings an action for equitable relief must establish such cause of action, or his complaint will be dismissed, nevertheless there are exceptional cases, and whenever a clear equity or right is found to have arisen between the parties in relation to the subject matter of litigation, the chancellor is authorized to retain the bill for the purpose of adjusting such equity or right: *Gliniski v. Zawadski*, 8 Fla. 405; *Green Bay Lumber Co. v. Miller*, 98 Iowa, 468, 62 N. W. 742, 67 N. W. 383; *Shipley v. Fink*, 14 Md. 219, 62 Atl. 360, 2 L. R. A., N. S., 1002; *Case v. Minot*, 158 Mass. 577, 33 N. E. 700, 22 L. R. A. 536; *Genet v. Howland*, 45 Barb. 560; *Hill v. O. born*, 60 Tex. 390. Hence when specific performance of a contract is denied, the court may, under special circumstances, retain the case for the purpose of awarding the plaintiff compensation or damages: *Aday v. Echols*, 18 Ala. 353, 52 Am. Dec. 225; *Allen v. Young*, 83 Ill. 338, 6 South. 747; *Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192, 15 South. 756; *Buckley v. Patterson*, 39 Minn. 254, 3

N. W. 490; *Cuff v. Dorland*, 55 Barb. 481; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532. The general rule, however, is to the contrary, so that where the plaintiff fails to make out a case for specific performance, his bill will be dismissed and not retained for the purpose of granting other relief: *Sims v. McEwen's Admr.*, 27 Ala. 184; *Lewis v. Yale*, 4 Fla. 418; *Eastman v. Simpson*, 139 Mass. 346, 1 N. E. 346; *McQueen v. Choteau's Heirs*, 20 Mo. 222, 64 Am. Dec. 178; *Murdock v. Anderson*, 57 N. C. 77; *Wrigglesworth v. Wrigglesworth*, 45 Wis. 255; *Fallon v. Railroad Co.*, 1 Dill. 121, Fed. Cas. No. 4629; *Zeringue v. Texas etc. R. R. Co.*, 34 Fed. 239.

The language of the New York court of appeals is instructive on this question: "The inherent, fundamental differences between actions at law and actions for equitable relief, such as determine whether a trial of the action by jury is a matter of right and otherwise affect the interests of the litigants, have not been, and cannot be, abolished. For such reason, and for the very simple reason that a person must in his complaint, as we have seen, state the facts constituting his cause of action, a plaintiff who brings an action for equitable relief must establish such cause of action, or his complaint should be dismissed. It is therefore frequently held that damages, as in an action at law, cannot be given in an action in equity where the plaintiff has failed to establish his right to equitable relief. It does not follow, that where a plaintiff has established a cause of action entitling him to equitable relief, a judgment rendered by the court for past damages alone is wholly unauthorized and erroneous where for reasons special and peculiar to the action the court in its discretion, or arbitrarily, refrains from granting the equitable relief to which, from the facts found, the plaintiff was entitled. It is said in *Pomeroy's Equity Jurisprudence*, section 237: 'It may be stated, therefore, as a general proposition, that a court of equity declines the jurisdiction to grant mere compensatory damages when these are not given in addition to or as an incident of some other special equitable relief, unless under special circumstances the exercise of such jurisdiction may be requisite to promote the ends of justice. There are, however, special circumstances in which the principle under discussion is invoked and is extended to the award of mere damages.' Instances may be mentioned, such as in actions for specific performance, where it is found on the hearing that the relief prayed for is impracticable, or in an action in the nature of a creditor's bill where it is ascertained upon the hearing that property fraudulently transferred has been conveyed to an innocent purchaser. Instances of judgment being rendered in such actions for money damages only are numerous. These cases are mentioned simply to show that a grant of equitable relief is not indispensable when the action is properly brought, and the facts upon which equitable relief is claimed are established, but where through special circumstances money damages

only are given, not because the plaintiff has improperly brought his action in equity, but because of such special circumstances": *Sadler v. New York*, 185 N. Y. 408, 78 N. E. 272.

## II. When the Pleadings are not Broad Enough to Warrant General Relief.

While a court of equity having jurisdiction for one purpose may go forward and give full relief as to all matters comprehended in the pleadings, still it is limited in the relief it may grant to allegations of the bill or other pleading, and cannot decree beyond their scope: *Dinwiddie v. Bell*, 95 Ill. 360; *Waldron v. Harvey*, 54 W. Va. 603, 102 Am. St. Rep. 959, 46 S. E. 603; *Broadis v. Broadis*, 86 Fed. 351. The chancellor cannot decide matters, whether legal or equitable, which have no connection with the subject giving the jurisdiction: *Haggin's Heirs v. Peck*, 49 Ky. (10 B. Mon.) 210.

## III. When the Particular Equitable Relief Sought is a Mere Pretense for Changing the Forum.

The rule that when a court of equity assumes jurisdiction of a cause for one purpose it retains jurisdiction for all purposes and proceed to determine the whole controversy is not so broad as to enable a litigant in an action at law to transfer the litigation from a legal to an equitable forum, merely by making some pretense against his adversary of some claim of fraud, mistake, right to account, or some other matter of equitable cognizance: *Collier v. Collier* (N. J. Eq.), 33 Atl. 193; *Walters v. Farmers' Bank*, 76 Va. 12; *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. Rep. 249, 30 L. ed. 451. A plaintiff cannot be permitted to deprive the defendant of the right to a jury trial by making allegations whereby an equitable issue is tendered, and, while wholly failing to prove such allegations, obtain a trial by the court of a common-law action arising out of the transaction: *Boonville Nat. Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529; *Brinckerhoff v. Burwick*, 105 N. Y. 567, 12 N. E. 58.

## IV. When a Jury Trial is Essential.

In the principal case the West Virginia court declares that it is not an infallible rule that equity, having jurisdiction for one purpose, will give full relief on all matters involved, though some are proper for a court of law; but that if a trial of such legal matters by a jury is essential to relief, or peculiarly more appropriate for trial by jury than by a judge, equity will decline jurisdiction as to those matters, thus leaving the parties to their legal remedies. When equity jurisdiction attaches for the purpose of discovery, there are exceptions to the rule that the court will go on and determine all questions in the cause, without regard to whether they are legal or equitable, and the decisive test is perhaps the necessity for a trial by jury of disputed questions of fact necessary to the ascertainment of the legal right involved or the quantum of relief to which the complainant is



be entitled: *Lynch v. Sumrall*, 8 Ky. (1 A. K. Marsh.) 468; *Freer v. Davis*, 52 W. Va. 1, 94 Am. St. Rep. 895, 43 S. E. 164.

#### V. In Case of the Administration of the Estates of Decedents.

In some jurisdictions, when a court of equity has acquired jurisdiction of the estate of a deceased person for some special purpose or to grant some special relief not within the province of the probate court, it will go on and close the entire administration: *Stewart v. Stewart*, 31 Ala. 207; *Cowles v. Pollard*, 51 Ala. 445; *Tygh v. Dolan*, 95 Ala. 269, 10 South. 837; *Coddington v. Bispham's Exrs.*, 36 N. J. Eq. 574; *Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263; *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376. It is believed, however, that if, in those states whose statutes provide a complete system of probate procedure and confer exclusive jurisdiction of estates of deceased persons upon probate courts, during the administration of an estate, it becomes necessary to invoke the aid of equity to accomplish some particular thing, that tribunal will, after the accomplishment of the particular purpose, send the cause back to the probate court for further administration, rather than take the entire proceeding away from the usual forum. The jurisdiction of equity should cease with its necessity: *Reinhardt v. Gartrell*, 33 Ark. 727; *Burton v. Burton*, 79 Cal. 490, 21 Pac. 847; *Cowdrey v. Hitchcock*, 103 Ill. 262; *Domestic etc. Missionary Soc. v. Eells*, 68 Vt. 497, 54 Am. St. Rep. 888, 35 Atl. 467.

#### VI. In Case the Sole Ground of Equity Jurisdiction is Merely Ancillary to Legal Remedy.

The application of the rule that a court of equity having jurisdiction of a case for any purpose may proceed to try all the questions in it, whether legal or equitable, rests somewhat in the discretion of the chancellor. And where the sole ground of equity jurisdiction is that a remedy merely ancillary to the legal remedy may be afforded, he may with propriety give the aid of his court to that extent and leave the parties otherwise untrammelled in their lawsuit: *Crenshaw v. Looker*, 185 Mo. 375, 84 S. W. 885.

#### VII. In Case of Bills of Discovery.

Some courts lay down the general proposition that when a court of equity has taken jurisdiction of a case for the purpose of discovery it will dispose of the case finally, even to the administration of legal remedies: *Virginia etc. Min. Co. v. Hale*, 93 Ala. 542, 9 South. 256; *Lancy v. Randlett*, 80 Me. 169, 6 Am. St. Rep. 169, 13 Atl. 686; *Craig v. Doherty*, 61 Miss. 96; *Dock v. Dock*, 180 Pa. 14, 57 Am. St. Rep. 617, 36 Atl. 416; *Lyons v. Miller*, 6 Gratt. 427, 52 Am. Dec. 129; *Yates v. Stewart*, 39 W. Va. 124, 19 S. E. 423. A liberal application of this rule would extend the function of bills of discovery far beyond their legitimate function of securing evidence, and open a wide field for the operation of courts of equity. And, therefore, some of the au-

thorities have recognized that a court of chancery, having taken jurisdiction for enforcing a discovery, will not universally assume cognizance of the cause, settle every question which may arise, and grant ultimate relief: *Middleton Bank v. Russ*, 3 Conn. 135, 8 Am. Dec. 164. Thus, the fact that a plaintiff is entitled to discovery is not necessarily a ground for extending the jurisdiction of the court to compel the defendant to account: *Daab v. New York Cent. etc. R. R. Co.* (N. J. Eq.), 62 Atl. 449; *Magic Ruffle Co. v. Elm City Co.*, 14 Blatchf. 109, Fed. Cas. No. 8950; *Foley v. Hill*, 2 H. L. Cas. 28, 37. Certain it is that a bill of discovery cannot be used as a mere pretext for bringing causes, properly cognizable in a court of law, into a court of equity: *Russell v. Clark*, 11 U. S. (7 Cranch) 69, 3 L. ed. 271; *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. Rep. 849, 36 L. ed. 451.

### WINGFIELD v. NEALL.

[60 W. Va. 106, 54 S. E. 47.]

**LIS PENDENS—When Applies.**—If the relief sought in a suit is for the recovery of the possession, or the enforcement of a lien, or an adjudication between conflicting claims of title, or any other judicial action affecting the title, possession or right to possession of specific property, then the property is so directly affected by the decree sought that it becomes subject to the law of *lis pendens*. (p. 885.)

**LIS PENDENS—Object of Rule.**—The prime object of the rule of *lis pendens* is to preserve the property, which is the subject of litigation, in order to make it possible for the courts to execute their final judgments and decrees. (p. 886.)

**LIS PENDENS—Purchaser Pendente Lite.**—To make a *pendente lite* purchaser, within the rule of *lis pendens*, there must be at the time of the purchase a pending suit. (p. 887.)

**LIS PENDENS—Writ of Error—Purchaser Pendente Lite.**—A writ of error is a new action, and one who purchases the subject of litigation between the time of the entry of final judgment and the suing out of the writ is not regarded as a *pendente lite* purchaser within the rule of *lis pendens*, but is considered a purchaser, without notice. (p. 887.)

**LIS PENDENS—Appeal—Purchaser Pendente Lite.**—A statutory appeal is a new action, and one who purchases the subject of litigation between the time of the entry of the final judgment and the perfection of the appeal is not regarded as a *pendente lite* purchaser within the rule of *lis pendens*, but as a purchaser without notice. (pp. 888, 889.)

**LIS PENDENS—Injunction—Purchaser Pendente Lite.**—If the holder of a trust deed attempts to sell the land conveyed thereby to pay delinquent installments of purchase money, and such sale is enjoined, and, pending the litigation and before an appeal is perfected from the judgment granting the injunction, the land is sub-

larly returned delinquent for the nonpayment of taxes, and is legally sold and conveyed to one who in turn sells and conveys it to another, the latter secures a good title, and the rule of *lis pendens* does not apply. (p. 894.)

J. P. Scott and C. D. Smith, for the appellant.

W. B. Maxwell and A. J. Valentine, for the appellees.

<sup>107</sup> SANDERS, J. By deed dated the twenty-eighth day of March, 1896, Mary A. Neall conveyed to A. C. Dunbrack three parcels of land, containing about four and a half or five acres, situated in the town of Parsons, Tucker county. Although the conveyance bears this date, Dunbrack did not comply with the terms of sale until the twenty-ninth day of June, 1896, on which date he executed his notes and a deed of trust, to secure the deferred payments on the property. In the meantime, on the fourth day of June, 1896, Mary A. Neall insured the house situated on the property in the sum of two thousand dollars, and upon her conveyance to Dunbrack, offered to assign to him the policy, upon payment of the sum paid by her on the premium. This Dunbrack refused to do, and she had the policy assigned to her, on the books of the company. The house was afterward destroyed by fire, and Mary A. Neall made a composition with the insurance company by which she accepted one thousand dollars as compensation for the loss, and thereafter had her trustee to advertise the property for sale, to pay the sum secured in the deed of trust given by Dunbrack.

Dunbrack secured an injunction, restraining this sale, on the ground that the policy insured to his benefit, and claimed that the amount thereof was sufficient to pay off and discharge the trust debt.

By decree entered November 28, 1898, the circuit court held that Dunbrack was entitled to have the amount of the insurance policy credited upon his debt, and decreed that upon the payment by him of the sum of thirty-one dollars and eighty cents, the balance found due, into court, the clerk of the circuit court should execute a release of the lien of said deed of trust. This sum was paid, and on the twenty-third day of May, 1900, the clerk executed the release, which was, on the same day, recorded in the office of the clerk of the county court.

From this decree, Mary A. Neall, on the twenty-eighth day of January, 1899, secured an appeal to the supreme court.

This appeal was never perfected, and at the following term of court, held at Charles Town, a motion was made to dismiss it. This motion the court refused to entertain, holding <sup>108</sup> that, inasmuch as there had been no bond filed, there was no appeal pending. On the eighth day of November, 1900, the appeal allowed January 28, 1899, was dismissed, and another appeal allowed, which was perfected, and heard and determined on April 1, 1904, this court holding that Dunbrack, not having paid the premium on the policy, was not entitled to have the amount thereof credited on his debt.

On the twenty-first day of August, 1900, Hannah Wingfield purchased from Dunbrack this property, for the sum of thirteen hundred dollars, which amount she borrowed from J. W. Knopsnyder, and executed a deed of trust to secure to him said sum, with W. G. Conley, as trustee.

Upon the cause of Dunbrack v. Neall being remanded to the circuit court, Mary A. Neall had her trustee advertise the property for sale, whereupon Hannah Wingfield applied for and obtained an injunction restraining the same, and later filed her bill, setting up the facts already stated, and the further fact that the property was returned delinquent for the years of 1897 and 1898, for the taxes thereon, in the name of A. C. Dunbrack, and purchased by William G. Conley and J. H. Moore; that Moore assigned the benefit of his purchase to Conley, who took a deed for said land from the clerk of the county court, and that she, on the twenty-seventh day of May, 1904, purchased the land from Conley. On the final hearing, the circuit court dissolved the injunction, and dismissed the bill.

The first question for consideration is, whether or not the plaintiff, Hannah Wingfield, was a pendente lite purchaser. It is claimed by her that the final decree had been entered in the circuit court, adjudicating that the Neall trust lien had been paid off, except the sum of thirty dollars and eighty cents, and providing when this amount was paid, for the clerk to release the trust lien; that the sum was paid, and the clerk did release the lien; also, that Mary A. Neall, in the suit of Dunbrack against her, had applied for and obtained an appeal, which she did not mature by giving bond and printing the record, and this having continued for some time, a motion was made to dismiss it, but this court decided that there was no appeal to dismiss, because, while it had been allowed.

it had not been matured by giving bond, and that after said ruling of this court, and on the twenty-first day of August, 1900, she purchased <sup>100</sup> the property in question, and paid a valuable consideration for it, and that afterward, on the eighth day of November, 1900, Mary A. Neall renewed her application for an appeal, which was granted and the same matured; and that, therefore, at the time she purchased, the appeal was not pending, and that she was not a pendente lite purchaser, but that she is a purchaser for value, without notice. But the appellees claim that she had actual knowledge of the suit, and also that she purchased within the time allowed by law for an appeal, and that an appeal was taken within that time, and the decree of the circuit court being reversed, her title fell with such reversal.

Is the question of *lis pendens* involved? In solving this question, it is necessary to determine whether the property sought to be subjected to the trust lien debt is the subject of the litigation. If it is, the doctrine applies; if not, it does not apply.

It is true that the suit of *Dunbrack v. Neall* was for the purpose of adjudicating whether or not the debt secured by the trust deed given by Dunbrack to J. S. Neall to secure the purchase money upon the property sold and conveyed to him by Mary A. Neall had been paid, but the legal title to the property was in the trustee, and Dunbrack held only the equity of redemption.

If the lien created by the trust deed, which is a lien upon specific real property, remained unpaid, the property was subject to be sold in satisfaction thereof, thereby directly affecting the property. If the relief sought in a suit is for the recovery of the possession, or the enforcement of a lien, or an adjudication between conflicting claims of title, or any other judicial action affecting the title, possession or right to possession of specific property, then the property is so directly affected by the decree sought that it becomes subject to the law of *lis pendens*. While this was not a suit brought by Mary A. Neall to enforce her trust lien, yet she was proceeding to enforce it as provided by the trust deed when joined, and her right so to do questioned by Dunbrack, and in this suit of *Dunbrack* against her, their rights must be determined, and if her lien is found to be unpaid, still the same rule will apply as would apply if Mary A. Neall had

come into equity to enforce it. If the circumstances <sup>110</sup> had been such as would have given her the right to file a bill in equity to enforce the trust deed, and she had done so, there is no doubt but that the law of *lis pendens* would have applied, the prime object of the rule being to preserve the subject of litigation, in order to make it possible for the courts to execute their judgments and decrees. As said in *Newman v. Chapman*, 2 Rand. (Va.) 93, 14 Am. Dec. 766: "It is founded upon the necessity of such a rule, to give effect to the proceedings of courts of justice. Without it, the administration of justice might, in all cases, be frustrated by successive alienations of the property which was the object of litigation, pending the suit, so that every judgment and decree would be rendered abortive, where the recovery of specific property was the object."

Of course, if the appellant had purchased before the final decree of the circuit court, adjudicating that the trust lien had been paid, and, instead of so decreeing, it had been adjudged a valid lien, she would then have been held to have bought subject to the trust lien, because it was of record, and she had constructive, if not actual, notice of it. But she did not purchase before the termination of the litigation in the lower court, and not until after the trust lien had been released, as was ordered by the court in the final decree. Then can it be said that she was required to take notice of the trust deed, which by the court's final decree was adjudged to have been paid, and ordered to be released? If, upon this adjudication the purchaser would not be required to go back of the decree, and look to the deed of trust, the doctrine of *lis pendens* should apply, in order to preserve the property that the decree of the court might be fully executed.

If the law of *lis pendens* did not apply, and, after the final decree, the decree of trust did not give notice to the purchaser, so as to hold any purchase of the property subject thereto, the successful litigant would be deprived of the fruits of the litigation, because some one happened to purchase the subject matter thereof after the rendition of the erroneous decree, and before reversal upon appeal. The rule of *lis pendens* must, therefore, apply in this character of cases.

Was the appellant a *pendente lite* purchaser? The property was purchased by her about twenty months after the

final <sup>111</sup> decree of the circuit court, and before the appellees procured an appeal from this court, which was allowed only a few days before the time for obtaining same would have expired by limitation. In order to make her a pendente lite purchaser, there must be, at the time of the purchase, a pending suit. If there is no pending suit, there can be no pendente lite purchaser. Therefore, in order to determine whether there was a pending suit at the time of the purchase, it is necessary to ascertain whether or not our statutory appeal is a continuing suit. If it does not operate to continue the suit, then the suit cannot be said to have been pending at the time of the purchase, because it ended with the final decree of the circuit court, and the appeal operated as a new suit, and the purchase having been made in the interim, the purchaser could not be regarded as a pendente lite purchaser. In order to determine this question, it will be proper to determine the scope and meaning of an appeal, in its origination, and in what way the remedy by appeal has been changed by statute, and then to compare our statutory appeal with a writ of error, as it is almost, if not universally, held that a writ of error is a new action, and that one who purchases the subject of the litigation between the time of the entry of the final judgment and the suing out of the writ, is not regarded as a pendente lite purchaser, but is considered a purchaser for value, without notice. And it may be well to remark that whatever may be said here in the discussion of this question is only intended to apply to appeals from the circuit court to this court, without in any way reflecting any views as to appeals from other tribunals to the circuit court.

An appeal was unknown to the common law. In the civil law and equity jurisprudence, its object was to take the whole case to the higher tribunal, there to be tried and determined de novo, upon the issues between the parties, as though the cause had originated in the appellate court. It will be found, upon examination of this question, that it is attended with considerable confusion, from the fact that in some of the states the appellate proceeding is denominated "appeal," while in others the distinction between appeals in equity and review upon petition in error is strictly adhered to. "Appeal" is sometimes used with us, in legal language, <sup>112</sup> to denote the nature of appellate jurisdiction as distin-

guished from original jurisdiction, without regard to the particular mode by which a cause is transmitted to a superior court. In fact, our constitution, article 8, section 3, so denominates it. Mr. Powell, in his work on Appellate Proceedings (section 4, chapter 6), says: "Although the various modes of proceedings are prosecuted in different ways and called by different appellations, as 'appeal,' 'review,' 'error,' and the like, and these names often confounded and misapplied, yet the object to be attained is one or the other of two results, either by an appeal to obtain a rehearing and new trial of the case upon its facts and merits, or a review of alleged errors in law in the record of the judgment and proceedings which will result either in the reversal or affirming of the judgment, which are properly called 'proceedings in error.' By the first—appeal—when perfected in accordance with the statute and the rules of the court, the whole case with its record and proceedings is taken from the court below into the appellate court, there to be again tried upon the issues between the parties as though the case originated in such appellate court; which appeal has the effect to set aside and vacate the original verdict and judgment in the case; and the result remains wholly dependent on the future judgment which may be rendered in the case upon the appeal and new trial. By the second proceedings—review and error—the result depends entirely upon the question whether the appellate court finds the alleged error in the record of the judgment and proceedings of the court below."

Where an appeal was taken, the judgment or decree did not become operative until the cause was finally tried and determined in the appellate court, as the appeal was taken at the same term at which final judgment or decree was entered in the lower court, and upon taking the appeal, the judgment or decree thereby became vacated.

"An appeal is a process of civil law origin, and is the appropriate mode of review for causes originating in a court of chancery. Unless statutes otherwise provide, it removes the whole cause, subjecting the facts as well as the law to review and retrial": 2 Ency. of Pl. & Pr. 31.

"An appeal is a process of civil law origin, and removes a  
113 cause entirely, subjecting the facts as well as the law to a review and retrial; but a writ of error is a suit of common-law origin, and it removes nothing for retrial but the law":



Wiscart v. Dauchy, 3 Dall. 321, 1 L. ed. 619; Dower v. Richards, 151 U. S. 658, 14 Sup. Ct. Rep. 452, 38 L. ed. 305; Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. Rep. 133, 47 L. ed. 200; Lyles v. Barnes, 40 Miss. 608; Ketchum v. Thatcher, 12 Mo. App. 185; State v. Doane, 35 Neb. 707, 53 N. W. 611; United States v. Goodwin, 7 Cranch (U. S.), 108, 3 L. ed. 284; 4 Minor, 1059; 2 Cyc. 515; 3 Blackstone's Commentaries, 453.

Having referred to the true meaning and scope of an appeal before statutory intervention, it will now be proper to determine what is the scope of the remedy afforded by appeal under our statute, and as compared with the remedy by writ of error.

The remedy by appeal, under our statute, is not given as a matter of right, nor does it operate to remove the cause to this court for trial de novo, neither is it required to be taken at the same term at which the decree complained of is rendered, nor is application made to the trial court for the appeal, as under the civil law. It is a process issuing out of this court upon petition assigning errors, the same as upon application for writ of error. In fact, the writ of error and appeal, under our statute, which are used to remove or bring causes to this court, are only distinguishable in this—appeal lies to equity proceedings, and writ of error to law causes. Therefore, our statutory appeal cannot be considered a continuation of the same suit, because the decree of the lower court, when not suspended, becomes final and operative upon the adjournment of the term, unlike at the civil law, for there, when appeal was taken, it was done at the same term, upon application to the trial court, and when done, the decree never became final.

This being so, the reason ceases for holding that an appeal is a continuation of the suit, while the writ of error is a new action. The decree appealed from is final; so is the judgment. If a writ of error is a new suit, why not an appeal? Under our statute, the two proceedings are alike. The judgment and decree are both final, and become operative upon the adjournment of the term at which they are rendered, if not suspended, and can only then be rendered inoperative by the awarding of a writ of error and supersedeas, or an appeal and supersedeas, as the case may be. "Except where the statutory proceeding called an appeal is nothing more

than a substitute for the common-law remedy, by writ of error, an appeal differs from the writ of error in that it is not a suit, but a continuation of the suit below": 2 Cyc. 518. "It is a well-established principle of appellate procedure that a writ of error is an independent action with the nature and with the general characteristics of a new and original suit": 7 Ency. of Pl. & Pr. 823. In the case of *Haley v. Elliott*, 20 Colo. 199, 37 Pac. 27, it is held that a writ of error is a writ of right, though subject to regulation by statute, and that it is the commencement of a new suit, and not a continuation of the old one; and see *Wise v. Brocker*, 1 Colo. 550; *Webster v. Gaff*, 6 Colo. 475. And in *Widber v. Superior Court*, 94 Cal. 430, 29 Pac. 870, it is held that a writ of error is a new and original suit, in which original process is issued, and which must be served upon the defendants in error, and which can only affect parties or strangers from the service of citation. The supreme court of Alabama holds that a writ of error is a new suit: *Gregg v. Bethea*, 6 Port. (Ala.) 9. And in *Taylor's Lessee v. Boyd*, 3 Ohio. 337, 17 Am. Dec. 603. "Reversal of decree in chancery under which purchaser in good faith and before service of citation on error acquired title does not divest the title of the purchaser."

In Florida it is held: "A writ of error is a new action, and not a continuation of the former suit": *State v. Mitchell*, 29 Fla. 302, 10 South. 746. And the same is held in *United States Mut. etc. Assn. v. Weller*, 30 Fla. 210, 11 S. E. 786.

By the supreme court of Illinois, in *Eldridge v. Walker*, 80 Ill. 270, it is held: "A writ of error to reverse a decree dismissing a bill to avoid a title is a new suit, and affords no notice to anyone of anything before it is sued out. Therefore, a purchaser for a valuable consideration paid after the order of dismissal and before the issuing of the writ of error, without other notice, will be protected against the equities of the complainant." And the same is held in *Barlow v. Standford*, 82 Ill. 298, and *Ripley v. Morris*, 7 Ill. 381. So in Indiana, we find the same doctrine. "If a person, having obtained a decree in chancery for certain land and been put in possession, sell the land to a bona fide purchaser for value before a suit in error to reverse the decree is commenced, the title of such purchaser, or of those claiming under him, will not be affected by a subsequent reversal of the decree": *McCormick v. McClure*, 6 Black. (Ind.) 466, 39

Am. Dec. 441. In *Macklin v. Allenberg*, 100 Mo. 337, 13 S. W. 350: "A purchaser from one who has acquired title by operation of a decree will be protected where the purchase was made after the termination of the suit, and before the suing out of the writ of error." In this state the writ of error is held to be not a continuation of the suit, but a new action.

The supreme court of Tennessee holds that a writ of error is a new suit: *Squib v. McFarland*, 58 Tenn. 563; *Mowry v. Davenport*, 74 Tenn. 80; *Spurgin v. Spurgin*, 40 Tenn. 23; *Ridgely v. Bennett*, 81 Tenn. 206. And in *Wooldridge v. Boyd*, 81 Tenn. 151: "A writ of error is a new suit, and the *lis pendens* under it does not begin until the service of the summons or subpoena."

In *Gibbs v. Belcher*, 30 Tex. 79, the supreme court of Texas holds: "The writ of error is a new action, brought in a superior court, founded upon a judgment of an inferior court, for the purpose of supervising it and correcting any errors that may have been in the proceedings of the court below." Bennet on *Lis Pendens*, section 78, says: "The general rule is that notice of *lis pendens* ends with final decree in chancery or judgment at law"; and also in section 40, same book, it is held that a writ of error is a new suit, and in section 70 the author says: "In all cases where judgments and decrees have been rendered, and neither appealed from nor superseded, and a writ of error is afterward sued out, the writ of error is a new suit, and a new *lis pendens* commences to run. This *lis pendens* of the writ of error, however, will relate back to the time of the rendition of the judgment or decree." And the author also says, in section 78: "Where an appeal is prayed and allowed as a part of the judgment or decree, and the terms of the appeal are complied with by the appellant, the judgment or decree becomes suspended and *lis pendens* is continued. . . . If, however, no appeal from the judgment or decree in the trial court shall be perfected, and no writ of error sued out, so as to be a stay of execution of the judgment or decree, *lis* <sup>116</sup> *pendens* ends at the time of the judgment or decree in the trial court."

The authorities can be multiplied to show that a writ of error is a new suit, and not a continuation of the suit, the proceedings of which are sought to be reviewed. There are a few cases which hold the contrary, and many which hold

that an appeal is a continuation of the suit, but this is not where the statute has so restricted the appeal that in its nature it only operates to review, as does a writ of error. Entertaining the views we do, we must conclude that the suit cannot be regarded as pending at the time that Hannah Wingfield purchased, and, therefore, she could not be held to be a purchaser pendent lite.

When, by the decree of the circuit court, the rights of the parties have been fully determined, and the decree has assumed finality, the successful litigant should have the fruits of the litigation, and where a stranger deals with reference to the property which is the subject of the litigation, after final decree and where it has become operative, and before an appeal and supersedeas has been allowed, he should be protected in his purchase. His equity is superior to that of the unsuccessful litigant. The case of *Lynch v. Andrews*, 25 W. Va. 751, does not run counter to the principles herein announced. In that case, Lynch purchased before final decree, and Judge Snyder, in delivering the opinion, says: "It is a fundamental principle that the rights of parties to a suit are only such as are settled and fixed by the ultimate result of the suit, and are in no respect affected by interlocutory or intermediate orders and decrees, which are vacated and annulled by the final determination and decrees of the cause."

The plaintiff also contends that the property purchased by her was returned delinquent for the nonpayment of taxes in the name of A. C. Dunbrack for the years of 1897 and 1898; that two parcels of it were purchased by W. G. Conley, and one parcel was purchased by J. H. Moore; that Moore afterward assigned his purchase to Conley, and that she purchased from Conley, and, for that reason, she has good title to the property. It is not denied, but admitted, that the property was returned delinquent, and purchased by Conley and Moore, nor are the proceedings under which this sale<sup>117</sup> was made attacked, in any way, for irregularity. But the defendants, in their answer, claim that Conley was only an ostensible purchaser; that he was acting as attorney for A. C. Dunbrack and trustee for J. W. Knopsnyder; that the purchase by him was, in fact, only a redemption on behalf of Dunbrack, and that shortly after the purchase, he, by an indorsement on the back of the receipts given him by the sheriff at the sale, assigned the receipt to Dunbrack, and that

thereby the redemption of said land became and was fully and effectually consummated. It is not denied that Moore was a bona fide purchaser, but it is claimed that the land purchased by him was redeemed in behalf of Dunbrack, and a memorandum made on the back of the receipt held by Moore to that effect, and the receipt was turned over to said Dunbrack, or to some one for him, by Moore, or by some one on his behalf, but that the indorsements on said receipts were afterward fraudulently erased. The general replication put the appellees, trustee and administrator of Mary A. Neall, upon proof of these allegations of the answer, but no proof upon their part was taken, and there is no evidence to substantiate these allegations. It is true these receipts are filed, but what do they prove? The receipts given by the sheriff to Conley show that the property was sold to him, and while it appears that they were assigned to Dunbrack, it does not appear that they were ever delivered to him, or that he ever paid one dollar toward the redemption or purchase. Conley, in his answer, says that they were not delivered, and that Dunbrack did not pay him anything on account of them. We cannot conclude from these assignments that Conley was authorized to redeem, and did redeem, this land for Dunbrack. It is just as reasonable to conclude that these assignments were indorsed on account of some subsequent transaction, which was never concluded. As to the Moore receipt, it is shown that it was assigned to Conley, and that he paid the cash for it. The claim that Conley was trustee, and, therefore, could not purchase the property, is not enable, because it is shown that the purchase by him was made some months before he became trustee in the deed from Iannah Wingfield to secure Knopsnyder, even if his being trustee would create such <sup>118</sup> relation as would make it improper for him to purchase the property.

We cannot say, from these facts, that these assignments were made to Dunbrack, or that the property was redeemed or him. If Conley was the agent of and acting for Dunbrack, and had authority to redeem, and did redeem, the property for him, it would seem that it could have been made to appear, but there is no attempt to show it, except by the unexplained receipts, with the indorsements thereon, and this, we think, does not do so.

Therefore, the property having been sold for taxes, purchased by Conley and deeded to him by the clerk of the county court, and Conley having conveyed the same to the plaintiff, gives the plaintiff title thereto.

The decree of the circuit court dismissing the plaintiff's bill and dissolving the injunction is reversed, and the injunction reinstated and perpetuated.

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*The Law of Lis Pendens* is the subject of a note to *Stout v. Philippi Mfg. etc. Co.*, 56 Am. St. Rep. 853. The purpose of the rule of lis pendens is to prevent third persons, during the pendency of litigation, from acquiring interests in the land which would preclude the court from granting the relief sought: *Merrill v. Wright*, 65 Neb. 794, 101 Am. St. Rep. 645. See, too, *Summerville v. March*, 142 Cal. 554, 100 Am. St. Rep. 145; *Bridger v. Exchange Bank*, 126 Ga. 821, 115 Am. St. Rep. 118. Two things are indispensable to give the doctrine of lis pendens effect. First, the litigation must be about some specific thing necessarily affected by the termination of the suit; second, the particular property involved must be so pointed out by the proceedings as to warn the whole world that they intermeddle with it at their peril: *Morange v. Doe*, 143 Ala. 459, 111 Am. St. Rep. 52.

*The Effect of the Reversal of a Judgment* is discussed in the note to *Cowdery v. London etc. Bank*, 96 Am. St. Rep. 124. Innocent third persons have a right to rely upon the judgment of a court having jurisdiction both of the subject matter and the parties, and interests acquired by them under it will be protected, notwithstanding its subsequent reversal: *Ure v. Ure*, 223 Ill. 454, 114 Am. St. Rep. 336. See, too, *Fidelity Trust etc. Co. v. Louisville Banking Co.*, 119 Ky. 675, 115 Am. St. Rep. 279.

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### MEYER v. BARNETT.

[60 W. Va. 467, 56 S. E. 206.]

**DOWER in Equitable Estate.**—If, under a deed, land is granted to a trustee for the use and benefit of the grantor to collect the rents, issues and profits and to pay the amount remaining thereof after payment of taxes, cost of insurance and repairs, to such grantor as demanded during his lifetime, reserving him the absolute power of disposition of the land in fee, with direction to the trustee to convey the land to such person as the grantor may name, and upon the death of such grantor to convey the residue, if any, to the children of such grantor or their decedents, and upon consideration of the whole deed it appears that the intention was to reserve to the grantor the absolute power of disposition in fee simple, he, after making such deed, remains at least the owner of an equitable estate in fee simple of the land, and his widow is entitled to dower therein, provided he was the owner of such title during coverture. (p. 895.)

W. Beard and C. A. Smith, for the appellant.

Van Winkle & Ambler, for the appellees.

<sup>467</sup> COX, J. Appellant, Josephine C. Meyer, widow of Jacob M. Meyer, deceased, complains of a decree of the circuit court of Wood county, entered in a suit in equity brought by her against his heirs at law in said court for the purpose of having dower assigned to her in the real estate of her late husband. It is conceded that she is entitled to dower in one parcel of real estate, known as the "Thanhouser property," <sup>468</sup> in the city of Parkersburg, and commissioners were appointed to assign dower in that property and to report upon certain other matters referred to them by said decree.

The principal controversy here is whether or not the appellant is entitled to dower in four other parcels of real estate, in the bill described and designated as numbers 2, 3, 4 and 5. The right of appellant to dower in these four parcels depends upon the validity and effect of a certain writing dated the 13th of September, 1899, executed by Jacob M. Meyer more than three years previous to his marriage with appellant. This writing on its face purports to be a deed of trust made by said Meyer to his son, C. A. Meyer. The purpose of the writing, as therein stated, and the granting clause thereof, are as follows: "Whereas, the said party of the first part is conscious of declining years, and in order to provide for support and maintenance during the residue of his life has deemed it proper to convey his real estate in trust to the said party of the second part, that the rents, issues and profits thereof might be collected, appropriated and applied to the support and maintenance of the said party of the first part; and in order to carry out such purpose and make substantial provision for his said maintenance and support, makes this deed according to the limitations and conditions hereinafter contained. Now, in consideration of the premises, the said party of the first part hereby grants and conveys unto the said party of the second part in trust for the uses and purposes and with the limitation hereinafter set forth all the following real estate now owned by him." Then follows the description of the four several parcels of real estate mentioned, and also these provisions: "But this conveyance is nevertheless in trust to the said party of the second part to have and to hold the said above described real estate and

each parcel thereof for the use and benefit of the said party of the first part to collect the rents, issues and profits thereof, and from the same to pay all the taxes, insurance and costs of repairs in, upon or against said property, and the net amount of such rents, issues and profits the said trustee shall pay as the same may be demanded to the said party of the first part for his absolute use and disposition, and to continue to pay such rents, issues and profits in the manner aforesaid to the said party of the first part for and during his <sup>469</sup> natural life unless there should be a sale of said property or a disposition thereof by the said party of the first part under the terms hereof during his said life. And then upon this further trust, that the said trustee at any time that the said party of the first part may require, shall upon request grant and convey by suitable conveyance to such person or persons for such consideration as the said party of the first part may demand to any person or persons that he may designate the said property or any part thereof may be conveyed, and upon such conveyance the said trustee shall be divested of all title, right, interest or claim in and to the property so directed by the said party of the first part to be by the said party of the second part conveyed as herein provided. Upon the death of the said party of the first part the said party of the second part shall, as to any residue of said property that may be unconveyed, convey the same by suitable conveyance as nearly equal in quantity and value as can be done to the child or children of the said Jacob M. Meyer or the descendants of any child or children who may survive him, except that in the event any of the said property shall have been conveyed by the direction of the said Jacob M. Meyer to any child or children that such child or children who shall have received property under a conveyance from said trustee as herein provided, they shall not participate or be entitled to any portion of the residue of the said real estate that might remain at the time of the death of the said Jacob M. Meyer." The decree complained of defeats the right to dower of appellant in said four several parcels of real estate, but recites that she is entitled to dower in the "Thanhouser property." It is uncontroverted that previous to said writing Jacob M. Meyer was the owner in fee of said four parcels of real estate.



Counsel for appellant contend that the writing mentioned is testamentary in character, and invalid because not properly executed and attested as a will; that, if it be considered a deed, it was never delivered, being found after the death of the grantor in his safe at his late residence; and that its legal effect, if delivered, was not to divest Jacob M. Meyer, the grantor, of the fee in such real estate. On the other hand, counsel for appellees, the heirs of Jacob M. Meyer, contend that the writing is a deed duly executed, acknowledged, <sup>470</sup> delivered and recorded, and that it operated to divest the grantor of any estate of inheritance in said real estate, and that, being executed previous to grantor's marriage with appellant, she is not dowerable in such real estate.

The single question is: Was the grantor, Jacob M. Meyer, or another to his use, at any time during the coverture of appellant, seised of an estate of inheritance in the real estate conveyed by the writing? Code 1906, c. 65, sec. 1. We shall first consider the legal effect of this writing, supposing it to be a deed properly executed and delivered, and not testamentary in character. In the case of *Morgan v. Morgan*, decided at this term, 60 W. Va. 327, 55 S. E. 389, this court announced the principles which must, in our judgment, govern the determination of the legal effect of this deed. That case involved the legal effect of a deed by which a grantor conveyed certain real estate to a trustee, upon trust that he permit the wife of a third person to possess the property and take the rents and profits thereof during her life, and upon the further trust that the trustee should sell or otherwise dispose of the property at such time and in such manner as the wife, by writing signed with her name, should direct, and upon the further trust that, should the wife die without having directed and completed any sale of the property and her husband survive her, then the trustee should convey the property to the husband in fee, and upon the further trust that, should the wife survive her husband and die without having sold the property, then the trustee should hold the property in trust for the heirs of the husband. In that case, it was held that the first taker, the wife, took an equitable estate in fee, and that the attempted limitation over to the husband or to his heirs was void for repugnancy and uncertainty. The principles upon which that decision was made are that the wife

was given an absolute and unlimited power of disposition of the property in fee, and that such power of disposition was the primary or dominant intention of the deed, and was intended to prevail over any words indicating a life estate only in the wife, and that the attempted limitation over after the death of the wife, being inconsistent with such a power of disposition, must yield to the primary or dominant intention. Upon this subject, we cannot do better than to repeat the language of Judge Tucker <sup>471</sup> in *Burwell's Exr. v. Anderson's Admr.*, 3 Leigh, 348, as follows: "From the earliest time it has been among the received doctrines of the common law that an absolute and unqualified power of disposing, conferred by will, and not controlled or explained by any other provision, should be considered as a gift of the absolute property. In this the law but corresponds with the dictates of common reason. Every man of ordinary capacity would understand a power to dispose of a thing as he pleased as a gift of the thing itself; and hence everyone who uses the phrase without qualification is understood by the law as intending a gift. The power of absolute disposition is, indeed, the eminent quality of absolute property. He who has the absolute property has inseparably the absolute power over it; and he to whom is given the absolute power over an estate acquires thereby the absolute property; unless there is something in the gift which negatives and overthrows this otherwise irresistible implication." In *Milhollen's Admr. v. Rice*, 13 W. Va. 510, Judge Green for this court said: "It is settled that if a testator gives property to devisee or legatee, to use or dispose of at his pleasure—that is, to consume or spend, sell or give away at his pleasure—such devisee or legatee has the fee simple or absolute property, even though his interest in it be called by the will a life estate, and there be a provision in the will whereby what may remain of the property at the death of the devisee or legatee is given to another person": See, also, *Shermer v. Shermer's Exrs.*, 1 Wash. 266, 1 Am. Dec. 460, 1 Wythe, 159; *Guthrie's Lessee v. Guthrie*, 1 Call (Va.), 7; *Riddick v. Cohoon*, 4 Rand. 547; *Melson v. Cooper*, 4 Leigh. 408; *May v. Joynes*, 20 Gratt. 692; *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810; *Davis v. Heppert*, 96 Va. 775, 32 S. E. 467; *Jackson v. Robins*, 16 Johns. (N. Y.) 537; *Wilmoth v. Wilmoth*, 34 W. Va. 426, 12 S. E. 731, and other cases. The law above stated applies alike to a deed or a will. It is true

that the deed here, like the deed in the *Morgan* case, provided that the first beneficiary should receive the rents and profits during life; but, considering all the provisions of the deed in question here, it does not seem that the provision in relation to rents and profits was intended to define the quantity of the estate remaining in the grantor. The stated purpose of the deed is that the land is conveyed for the use and benefit, and to provide for the maintenance and support, of <sup>472</sup> Jacob M. Meyer. His power of disposition of the fee simple during his life was certainly absolute and unlimited. No contention is made by either side that he did not have the absolute and unlimited power of disposition of the fee after the deed was made. The fact that he did not exercise that power does not change the quantity of the estate in him. This absolute and unlimited power of disposition appears to us to have been the primary intention of the deed; that is, intended to prevail over any words of the deed indicating that a life estate only was reserved to the grantor. The provision of the deed directing the trustee to convey to the children and descendants upon the death of Jacob M. Meyer was by its own terms made subject to his power of disposition in his lifetime. This provision directs the trustee, upon the death of Jacob M. Meyer, to convey to his children or descendants only the residue of said property that may be unconveyed. Thus, the paramount right of Jacob M. Meyer to have the property conveyed in his lifetime is expressly recognized in this provision.

It is unnecessary further to repeat the principles announced in *Morgan v. Morgan*. Under the authorities there and here cited, we are forced to the conclusion that Jacob M. Meyer after the deed in question remained the owner of at least an equitable estate in fee simple in the four parcels of real estate which purport to be conveyed by the deed. It is immaterial to inquire whether or not he had the legal title, under principles announced by this court in *Angle v. Marshall*, 55 W. Va. 671, 47 S. E. 882, because the widow is dowable, even if the estate be only a perfect equitable estate in fee. This equitable estate in fee remained in Jacob M. Meyer after his marriage with appellant and until his death. Therefore, she is entitled to dower in the said four several parcels of real estate, as well as in the "Thanhouser property." Our views of the legal effect of the deed make it unnecessary to discuss

the question as to delivery of the deed, or whether it is testamentary in character, or any other matter raised. If the deed was or was not delivered, appellant is entitled to dower. If it is testamentary, she is likewise entitled to dower, because it cannot stand as a will, not being executed and attested according to the statute.

The decree complained of properly ascertained that appellant <sup>473</sup> is entitled to dower in the "Thanhouser property." and we now hold that she is also entitled to dower in the four several parcels of real estate described in said deed of the 13th of September, 1899, and also in the bill, and designated therein as numbers 2, 3, 4 and 5. This holding changes the situation. It may be that full dower may be assigned to the widow in one parcel: *Alderson's Heirs v. Henderson*, 5 W. Va. 182. Whether such is the case or not does not now appear. However, the situation being changed by our decision, we think that the decree complained of should be reversed in toto so that the lower court, having before it the whole subject of assigning dower in all the real estate, may proceed according to the principles of equity in so doing.

For the reasons stated, the decree complained of is reversed, and this cause remanded to be further proceeded with according to the principles herein announced and the rules governing courts of equity.

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*An Estate in Fee is Created by a devise of land to hold and dispose of as the devisee may deem best:* *Bass v. Bass*, 78 N. C. 374; *Calbertson v. Daly*, 7 Watts & S. 195. See, too, *Bradley v. Carnea*, 94 Tenn. 27, 45 Am. St. Rep. 696.

*A Widow may have Dower in an equitable estate of her husband:* *Graham v. Graham*, 6 T. B. Mon. 561, 17 Am. Dec. 166; *Stevens v. Smith*, 4 J. J. Marsh. 64, 20 Am. Dec. 205; *Fortune v. Watkins*, 94 N. C. 304; *Everett v. Everett*, 71 Iowa, 221, 32 N. W. 273. Compare *Whiteaker v. Vanschoiack*, 5 Or. 113; *McClure v. Fairfield*, 153 Pa. 411, 36 Atl. 446.

**POCAHONTAS COKE COMPANY v. POWHATAN COAL  
AND COKE COMPANY.**

[60 W. Va. 508, 56 S. E. 264.]

**INJUNCTION—Motion to Dissolve.**—Upon the hearing of a motion to dissolve an injunction, no answer having been filed, the allegations of the bill must be taken to be true. (p. 910.)

**ANTI-TRUST LAW—Illegal Contract—Interstate Commerce.**—Before a contract can be declared illegal by reason of the act of Congress known as the "Anti-trust Law," such contract must clearly appear to be within the provisions of such act, and must at least contemplate interstate or international commerce in dealing with the commodity which constitutes its subject matter. (p. 911.)

**MONOPOLIES—Construction of Contract.**—For the purpose of determining whether or not a contract is illegal as creating a monopoly under the rules of the common law, not only the contract must be considered, but also its subject matter, the situation of the parties and all the circumstances surrounding the transaction so far as they are disclosed. (p. 911.)

**MONOPOLIES—Subjects of.**—If a contract concerning an article of prime necessity would be illegal as in unreasonable restraint of trade, it is likewise illegal if its subject matter is any other article of legitimate trade or commerce. (p. 911.)

**MONOPOLIES—Effect of Contracts Creating.**—If several contracts effectuate and consummate an arrangement, combination or trust in unreasonable restraint of trade tending to create a monopoly and against public policy, every contract whereby such combination or trust is effectuated and established is void and unenforceable between the parties, and the courts will refuse to assist them in enforcing its performance. (p. 912.)

**MONOPOLIES Embrace Any Combination** the tendency of which is to prevent competition in trade in its broad and general sense, and to control prices to the detriment of the public. (p. 912.)

**TRADE TRUSTS—Definition.**—A trade trust is a contract, combination, confederation or understanding, express or implied, between two or more persons, to control the price of a commodity or services for the benefit of the parties thereto, and to the injury of the public, and which tends to create a monopoly, and may be formed orally as well as in writing. (p. 912.)

**MONOPOLIES are Void** as being in restraint of trade and against public policy. (p. 912.)

**TRADE TRUSTS—What Constitutes.**—If the direct and necessary or natural effect of a contract or combination among producers and sellers of a commodity is to restrain competition and control prices to the injury of the public when all of the powers of the contract or combination shall have been exercised, it must be deemed as in unreasonable restraint of trade, against public policy, and void. (p. 916.)

**TRADE TRUSTS and Monopolies—Defenses.**—It is no defense to the illegality of a contract or combination which is in unreasonable restraint of trade to show that in the particular case a complete

monopoly has not been formed, or that no control of prices has been exercised, or that prices have been lowered and not raised (p. 917.)

**TRADE TRUSTS—Test of Legality.**—A contract which is charged to be in illegal restraint of trade is not to be tested by what has been done under it, but by what may be done under it, not by its performance, but by its powers of performance when fully exercised (p. 917.)

**TRADE TRUSTS.—Illegality of Contracts or combinations for the restraint of competition** does not lie in the agreement not to compete, but in the reflex injury to the public. (p. 917.)

**TRADE TRUSTS—Avoidance of Destructive—Competition.**—The public cannot compel competition, but the law in the interest of public policy can and will remove unreasonable restraints by contract upon competition in trade by refusing to enforce the contract and leaving the parties free to compete if they choose, and the fact that the purpose of a contract is to avoid destructive competition will not save it from illegality if it is in unreasonable restraint of trade. (p. 922.)

**TRADE TRUSTS and Monopolies.**—It is not essential that a monopoly be complete before it is illegal, as an unreasonable restraint of trade which is only partial is illegal. (p. 923.)

**INJUNCTION—Motion to Dissolve for Want of Equity in Bill.**—If there is no equity in the bill, a motion to dissolve a preliminary injunction should be sustained. (p. 924.)

W. A. Glassgow, Jr., Hold & Duncan and W. Stokes, for the appellee.

Rucker, Anderson, Strother & Hughes, Strother, Taylor & Flanagan, Vinson & Thompson, and R. C. and B. McClaugherty, for the appellant.

510. **COX, J.** The appellant, Powhatan Coal and Coke Company, complains of the order of the judge of the circuit court of McDowell county, made in vacation on the 16th of July, 1906, overruling its motion to dissolve an injunction awarded by said judge in vacation on the 2d of July, 1906, upon presentation of a bill in equity by appellee, Pocahontas Coke Company, against appellant. In order to have a proper understanding of the questions involved in this case a somewhat extended statement is necessary. Appellee by its bill upon which the injunction was awarded, alleges substantially that it is a corporation under the laws of West Virginia and that it was organized pursuant to, and that the main object of its organization is set forth in, a contract among the various producers and manufacturers of coke in the Pocahontas Flat Top Coal Field, dated the 29th of June, 1906, a copy of which is filed with the bill, and, omitting signature, is as follows:

"This agreement made this 29th day of June, 1905, between the undersigned, producers and manufacturers of coke, in the Pocahontas-Flat Top Coal Field.

"Witnesseth, that whereas, it is deemed expedient that there should be some arrangement perfected, to improve conditions in the manufacture, inspection and shipment of coke, and to regulate and to improve the quality of coke manufactured in the district mentioned,—therefore the parties hereto, do hereby agree:

"I. That upon the signing of this agreement the parties hereto will apply for a charter and organize a corporation, to be known as the Pocahontas Coke Company, the authorized capital stock of which shall be one hundred and fifty thousand dollars (\$150,000) each share of which shall be of the par value of ten (10) dollars, and the officers of which shall be a President, a Vice-President, a Secretary and Treasurer (which latter two offices may be held by one person), a General Manager, who may be President or Vice-President, and a Board of Directors of Seven or more members.

"II. The object of said Pocahontas Coke Company shall be, to facilitate the manufacture, inspection, shipment and betterment of coke from the Pocahontas Flat Top Coal Field, and to regulate, improve and standardize the quality of coke manufactured in the district aforesaid.

"III. The parties hereto, who are operators of coke ovens, shall be entitled to subscribe for one share of the capital stock of said Company, for every coke oven owned by such party, provided that immediately upon the allotment of such stock to such party he or it shall make with Pocahontas Coke Company a three-year contract for the sale by it of all coke produced by such operator at a commission of five cents (5c) per net ton, on the coke sold; and provided, further, that no stock subscription in Pocahontas Coke Company shall be accepted from any operator until such three-year contract, as to coke produced by him or it, shall have been made and entered into.

"IV. The subscriptions to the stock of said Company shall be paid, fifty per cent (50%) in cash, and the balance on call of the Board of Directors, as the needs of the Company may require.

"V. It is further agreed that there shall be named by a majority of the parties to this agreement, three (3) trustees,

who shall hold the stock of each party hereto, which when issued shall be properly assigned in blank and deposited with said Trustees. In case of death or redemption of any trustee, his successor shall be elected by a majority of the stockholders of Pocahontas Coke Company, at a special meeting called for that purpose, or at any general or regular meeting.

"VI. After the payment of the expenses of operating Pocahontas Coke Company, the surplus, if any, derived by said Company from the commissions received by it from the sale of coke or otherwise, shall be declared annually as dividends upon the stock held by each stockholder, each stockholder to have the same proportion of such surplus as the number of tons of coke furnished by him or it, bears to the whole number of tons of coke furnished to said Company for sale. The stock issued by such company shall at all times be held by the trustees, as aforesaid, but the voting power thereon shall be and continue in the stockholders. Each share of stock shall be entitled to one vote.

512 "VII. If a stockholder in Pocahontas Coke Company, shall decline to renew his or its contract aforesaid, then the stock of such person or corporation shall be sold by the Trustees to Pocahontas Coke Company, at its book value, and the proceeds thereof shall be turned over to such person or corporation, declining to renew his or its contract as aforesaid.

"VIII. There shall be for the Company a General Manager who shall have active and general charge and management of the business of the Company, and who shall not be interested in any coke operation or plant, and said General Manager shall be entirely impartial and disinterested and have no special interest in any particular coke property or operation, and shall devote his entire time to the business of Pocahontas Coke Company.

"IX. There shall be a chief inspector and such assistant inspectors as may be necessary, who shall be disinterested and impartial persons, without any interest in any plant or operation producing coke, and such inspector and his assistants shall inspect the coal produced by the stockholders of Pocahontas Coke Company, and shall enforce such rules and regulations as to the manufacture and inspection of coke as may be prescribed by the Board of Directors.



"X. Pocahontas Coke Company is to take from the parties with whom it has contracts as aforesaid, all of the coke produced by them, to the extent that railroad facilities may be furnished to transport the same, as long as market conditions will enable Pocahontas Coke Company to dispose of same at or above the cost of production.

"XI. The parties to this agreement are to keep such ovens burning as may be necessary to supply their or its proportion of the sales of coke made by Pocahontas Coke Company.

"XII. The organization of Pocahontas Coke Company is not to be delayed by reason of any existing contracts, which the parties hereto may have for the sale of coke; but said contract shall be assumed and carried out by Pocahontas Coke Company, upon the terms thereof and it shall be entitled to its commission upon the coke delivered thereunder.

513 "XIII. If at any time the coke produced by any person or corporation with whom or which Pocahontas Coke Company may have a contract as aforesaid, shall be unsatisfactory, then such person or corporation shall bring his or its coke up to the proper standard and carry out such directions in the manufacture, handling and preparation of coke as may be prescribed by the Board of Directors of Pocahontas Coke Company, or by its Executive Committee.

"The contract of each stockholder of Pocahontas Coke Company shall provide for the sale of its or his entire output of coke through Pocahontas Coke Company in the market, and in said contract there shall be prescribed a penalty or liquidated damages in case said operator shall sell his or its coke through any other agency, or to any other person, than Pocahontas Coke Company, and such other provisions as may be mutually necessary for the protection of the producer of coke and Pocahontas Coke Company, and for the inspection and improvement of the coke and bringing the same to a proper standard and authorizing the Inspectors to reject any coke not up to the proper standard. Any party to this agreement furnishing coke, for which the purchaser may decline to pay the full price, on account of unsatisfactory quality, shall bear such loss.

"Witness the following signatures:"

This contract purports to have been executed by twenty of said coke producing and manufacturing corporations, and hereafter will be referred to as "contract A."

Appellee by said bill further alleges that the parties to contract A, including appellant, subsequently became stockholders of the appellee under the terms of said contract, and that appellant and every other stockholder of appellee, in accordance with the requirement of contract A, entered into a "uniform contract" with appellee, whereby appellee was appointed the true and legal sole sales agent of the producers and manufacturers of coke in said coal field (they being the stockholders of appellee), for the purpose of selling all coke produced or manufactured at the ovens owned, or which during the period covered by contract A might be owned, by appellant, and such other parties as should enter into such uniform contract. A blank copy of said "uniform contract" is filed with the bill, and hereafter will be referred to as "contract B." It is as follows:

514 "This agreement, made this — day of —, 1905, between —, a corporation chartered and organized under the laws of the State of West Virginia, of the first part, and Pocahontas Coke Company, a corporation, chartered and organized under the laws of the State of West Virginia, of the second part:

"Witnesseth, That for and in consideration of the mutual covenants and agreements to be performed by each, as well as the sum of One Dollar paid by each party to the other. the receipt whereof is hereby acknowledged, the parties hereto do hereby agree as follows, to wit:

"First. The party of the first part does hereby make, constitute and appoint the party of the second part its true and lawful sole sales agent for the purpose of selling all coke produced or manufactured at the ovens now owned or which may during the period covered by this contract, or any extension thereof, be owned by the party of the first part. The party of the first part agrees to deliver, at its ovens, to the party of the second part all the coke produced or manufactured by it during the period covered by this contract or any extension thereof; Provided, however, That whereas the party of the second part has made, or may make agreements or contracts, to act as the selling agent for other producers of coke, than the party of the first part, therefore, the party of the second part shall only be required to take such quantity of coke from the parties from whom it acts as agent, as railroad facilities may be furnished to transport, and the party of the second part shall also only be re-

quired to take such quantity of coke from all of the persons whom it represents as agent, as the market conditions will enable it to dispose of, at or above the cost of production. And if the party of the second part shall be unable to take all of the coke produced by the principals represented by it, it shall only be required to take from the party of the first part such proportion of the whole amount of coke handled by it, as the number of coke ovens owned by the party of the first part, bears to the number of coke ovens owned by all producers and manufacturers of coke for whom the party of the second part shall act as agent.

"Second: The party of the second part agrees to sell said <sup>515</sup> coke, delivered to it as aforesaid, by the party of the first part, for the best price that the market at the time of such sale will afford.

"Third: The party of the first part agrees to pay to the party of the second part and the party of the second part agrees to accept a commission on sales of coke made by it as such agent, of five cents (5c) per ton of 2000 pounds, on all coke sold for the party of the first part. The party of the second part agrees to accept said commissions upon the condition that it is hereby employed as the sole and exclusive sales agent of the party of the first part.

"Fourth: It is further agreed by the parties hereto, that in case of a breach of the covenant on the part of the party of the first part to deliver, at its ovens, to the party of the second part, all the coke produced or manufactured by it, during the period covered by this contract or any extension thereof, that the party of the second part shall, at its option, be forthwith entitled to terminate this agreement, and in the event of such termination the party of the first part shall forfeit all interest in or right to deliver coke upon any contracts taken or sales made, theretofore, by the party of the second part, and which at the time of such termination, remain wholly or partially unfilled, but this provision shall not be so construed as to relieve the party of the first part from furnishing its due proportion of coke, to enable the party of the second part to fill such unexpired or incomplete contracts, if required so to do, by the party of the second part, notwithstanding notice of the termination of this contract may have been given by the party of the second part to the party of the first part.

"Fifth: The party of the second part agrees to act as agent of the party of the first part upon the terms and conditions in this agreement expressed, and to use its best efforts to sell the coke of the party of the first part at the best price that the market will afford.

"Sixth: The party of the second part hereby guarantees payment for all coke sold by it, as such agent, at the average price for all coke handled by it, passing the weigh scales each month, and agrees to take charge of the inspection, shipment and delivery of said coke and the collection of bills therefor, pay the cost of such inspection and <sup>516</sup> all tolls and other charges in connection with such shipment and delivery, and to pay to the party of the first part on the 25th day of each and every month during the continuance of this contract, the proceeds of all coke delivered for its account at the average price aforesaid and passing the weigh scales of the Norfolk & Western Railway Company, or the Western Weighing Association during the next preceding calendar month; the weights on which said scales shall govern and be binding upon both parties to this agreement. It is also agreed that all expenses connected with the selling of such coke shall be borne by the party of the second part.

"Seventh: The party of the second part agrees to keep complete and accurate books of account and proper vouchers for all transactions as such agent, which books and vouchers and all other papers relating to such transactions shall at all times during business hours of the day be open to verification by a disinterested expert accountant, appointed by the party of the first part. It is further agreed that the party of the second part shall furnish to the party of the first part as soon as convenient after the first day of each calendar month, during the continuance of this agreement, a statement showing the total tonnage handled by it from each and every person during each month, together with a statement of the average price obtained for such coke.

"Eighth: The party of the first part under this agreement shall be responsible for the quality of coke it ships, and it agrees to assist in building up and maintaining the standard of coke; and it is further agreed by the party of the first part that the size of slack and freedom from impurities, shall be such as to insure the making of good merchantable coke, and in order that the coke manufactur-

by the party of the first part shall be loaded into cars free from ashes and breeze, it is hereby agreed that all coke loaded and shipped hereafter shall be loaded by means of standard 14 tine forks of 20 inch spread; out to out.

"Ninth: The party of the second part reserves the right to employ an inspector or inspectors to examine and report to the party of the second part on the quality and grade of <sup>517</sup> the coke manufactured by the party of the first part, and also to report as to the care of the party of the first part in loading the same at the ovens. And the party of the first part hereby agrees that its Manager, 'Coke-Boss,' or other person in authority, shall co-operate with the inspector or inspectors of the party of the second part, in bringing the coke manufactured by it up to the standard now or hereafter established by the party of the second part. And the party of the first part further agrees that it will manufacture such coke in accordance with the rules now or hereafter established and promulgated by the party of the second part, and that it will also see that the coke is loaded into the cars free from ashes and breeze and in good order for shipment.

"It is further agreed by the party of the first part that the party of the second part shall endeavor to sell all inferior coke furnished to it, by the party of the first part, for the account of the party of the first part, making return to it of the price received therefor, less cost of sale and commission.

"Tenth: This agreement shall continue in force for three years from the — day of ———, 1905. And after the date for the expiration thereof, this contract shall continue in force for like periods of three years unless terminated by notice as hereinafter set forth; Provided, that this agreement may be terminated by either party hereto, at the end of the first or any of said periods of three years aforesaid, by giving to the other party hereto a written notice, three months or more before the end of any such period of three years, of its desire to terminate the same.

"In witness whereof, etc."

Appellee by its bill makes certain other allegations intended to show that the damages to it will be irreparable if appellant shall break, and withdraw from, said contract B, including an allegation that appellee has outstanding contracts for the sale of coke, which it will be unable to fill if appellant shall be permitted to withdraw from said contract

B. Appellee by its bill further alleges in substance that on the twenty-seventh day of June, 1906, it received a notice from appellant, whereby the latter undertook to terminate its contract B, and gave notice that it would no longer deliver coke to <sup>518</sup> appellee under said contract, and that appellee also received similar notices from seven of the corporations, including appellant, which entered into contracts A and B.

The injunction awarded on said bill restrained appellant from selling through any agents or agencies other than appellee, or in any other way, any of the coke covered by the terms of the contract B, which appellee had before that time, or might afterward, before the expiration of said contract, sell in accordance with the terms thereof, and from refusing to carry out said contract by withdrawing the coke aforesaid from appellee as its selling agent for the same, and required appellant to continue to ship its coke to the order of appellee as its sole selling agent under said contract until the further order of the court.

The appellee seeks by this preliminary injunction to enforce the performance of contract B until the further order of the court. The motion to dissolve was made in vacation before answer by appellant. No answer was offered at the hearing of the motion. Under these circumstances, the allegations of the bill must be taken as true on the hearing of the motion. An affidavit was filed at the hearing by appellant, without answer to the bill, and was considered by the judge in determining the motion. The affidavit tended to show the existence of facts not disclosed by the bill, or facts explanatory of the allegations of the bill. It should not have been considered in the determination of the motion. No answer having been filed, the motion should have been determined alone from the allegations of the bill, taking them as true: *Peatross v. McLaughlin*, 6 Gratt. 64; *Ludington v. Tiffany*, 6 W. Va. 11; *Town of Harper's Ferry v. Kaplon & Bro.*, 58 W. Va. 482, 52 S. E. 492. In determining whether or not the judge of the circuit court erred in refusing to dissolve the injunction, we must do so without regard to the additional facts which the affidavit tends to show.

One of the several grounds assigned why the circuit judge should have sustained the motion to dissolve is that the contract sought to be enforced by the bill is in restraint of

trade, tends to monopoly, and is against public policy. Under this ground, it is contended (1) that the contract is illegal under the act of Congress known as the "Anti-trust Law," passed July 2, 1890; (2) that the contract is illegal under the <sup>519</sup> rules of the common law. The act of Congress declares illegal every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations. Before we can hold the contract here involved to be illegal under the act of Congress, the contract must clearly appear to be within the provisions of the act: *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. Rep. 436, 48 L. ed. 679; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 Sup. Ct. Rep. 540, 41 L. ed. 1007; *Slaughter v. Thacker Coal etc. Co.*, 55 W. Va. 642, 104 Am. St. Rep. 1013, 47 S. E. 247, 65 L. R. A. 342. The facts before us fail in one essential and necessary particular to bring the contract within the inhibition of the act of Congress. It does not appear that the contract contemplated interstate or international commerce, in dealing with the coke which constituted its subject matter. The contract is capable of being fully performed within this state. There is nothing on the face of the papers from which we can infer with certainty that commerce outside of the state was contemplated, and we cannot, therefore, in the present condition of the record, declare the contract to be illegal under that act.

Leaving the act of Congress, we come to a consideration of the contract under the principles of the common law. For the purpose of determining whether or not the contract is illegal under the rules of the common law, we consider not only the contract, but its subject matter, the situation of the parties, and all the circumstances surrounding the transaction, so far as they are disclosed by the allegations of the bill: *Beach on Monopolies and Industrial Trusts*, sec. 46; *Eddy on Combinations*, sec. 784. Coke, the subject matter of the contract, is a legitimate article of trade and commerce, a commodity of extensive use. Under the recent decisions, it is immaterial whether it is an article of prime necessity or not. If a contract concerning an article of prime necessity would be illegal as in unreasonable restraint of trade, it is likewise illegal if its subject matter be any other article of legitimate trade or commerce: 20 Am. & Eng. Ency. of Law, 849, 850; *United States v. Addyston Pipe etc.*

Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122. If the questions were material, we would have little difficulty in arriving at the conclusion that coke, like coal, is properly classified under the head of necessities.

Twenty separate and independent coke manufacturing and <sup>520</sup> producing corporations, operating in the same coal field, entered into contract A, and afterward each entered into contract B. Do these contracts, under the circumstances appearing, effectuate and consummate an arrangement, combination or trust in unreasonable restraint of trade, tending to monopoly and against public policy, under the common law? If so, every contract whereby such combination or trust was effectuated and established is void and unenforceable between the parties, and the courts will refuse to assist them in enforcing its performance: 20 Am. & Eng. Ency. of Law, 857; Charleston Gas Co. v. Kanawha Gas etc. Co., 58 W. Va. 22, 112 Am. St. Rep. 936, 50 S. E. 876. We approach the determination of this question realizing the great change that has taken place in industrial conditions and in business methods from those prevailing in the early history of the common law, and that courts are constantly called upon to apply the principles of that law to such new conditions, in view of many decisions diverse and oftentimes conflicting, and amid an evolution of the application of old principles rather than the announcement of new principles and to reach conclusions guided by what they deem the best considered cases and authorities on the subject.

Monopoly, in its original sense, was an exclusive right granted by the state to one or a few of something which was before of common right. As now used and understood, monopoly embraces any combination the tendency of which is to prevent competition in its broad and general sense, and to control prices to the detriment of the public. A trust has been defined as a contract, combination, confederation or understanding, express or implied, between two or more persons, to control the price of a commodity or services for the benefit of the parties thereto, and to the injury of the public and which leads to create a monopoly. "More accurately, perhaps, it is the entity resulting from the contract, etc., just described": 20 Am. & Eng. Ency. of Law, 846, and cases there cited. It seems that such unlawful combination may be formed orally, and that a writing is not necessary to its illegality: *Harding v. American Glucose Co.*, 182 Ill. 551.



74 Am. St. Rep. 189, 55 N. E. 577, 64 L. R. A. 738. Monopolies are condemned at common law, as being in restraint of trade, and against public policy: Case of Monopolies, 11 Coke, 84; *Mitchel v. Reynolds*, 1 P. W. 181.

<sup>521</sup> In his work on the Fourteenth Amendment, page 378, Judge Brannon, of this court, in concluding his remarks on trusts and combinations, says: "The nation has no power over the subject, except so far as such trusts may affect interstate commerce. The case just mentioned (85 Fed. 271) concedes full power to the states over trusts so far as they affect their internal commerce. So it can be said that, regardless of the benefits that may accrue from trusts, as the court said as to interstate commerce, we may say as to intra-state commerce, when the question of the lawfulness of a combination arises, that if its logical, probable effect is to enhance prices, or put it in the power of the combination to do so, or to suppress competition or prejudice the freedom and naturalness of trade, that combination is unlawful."

Concerning monopolies, Professor Pingrey, in his work in *Industrial and Interstate Contracts*, section 320, says: "At common law, a contract calling for a reasonable restraint of trade will be upheld. It is only the unreasonable restraint of trade that receives the condemnation of the law, whereby monopolies were created. Monopolies may be divided into three classes: 1. All sources of supply may be put in the hands of one company, so no other source of supply is available. Such a monopoly is absolute, and can sell its products at any price limited to the necessities of commerce. 2. The monopoly may have the best and most economical source of supply, but competition still be possible, when competition can be suppressed by selling so low by the monopoly that competition is impossible. 3. The monopoly may use its general control of the market to require all parties to buy from it alone under penalty of being denied further supplies. This method is generally practiced by the monopoly."

In 20 *American and English Encyclopedia of Law*, 849, it is said: "By the weight of recent authority, the character of the article of legitimate trade sought to be monopolized is immaterial, the true test of the illegality of the combination being the injury to the public, and whether its necessary consequence is to control prices, limit production, or suppress competition in such a way as to restrain trade and create a monopoly. To render the combination illegal

on this ground, it is not necessary that evil intent or actual injury be shown, but it is <sup>522</sup> sufficient to know that the inevitable tendency of the act is injurious to the public."

In *Chesapeake etc. Fuel Co. v. United States*, 115 Fed. 610, 53 C. C. A. 256, decided by the circuit court of appeals, sixth circuit, in which Judge Day delivered the opinion, it was held, in point 4 of the syllabus, that "it is the declared policy of Congress, which accords with the principles of the common law, to promote individual competition in relation to interstate commerce, and to prevent combinations which restrain such competition between their members, or between such members as individuals and outside competitors; and it is no defense to a suit to dissolve such a combination, under the anti-trust law, that it has not been productive of injury to the public, or even that it has been beneficial, by enabling the combination to compete for business in a wider field."

In *Addyston Pipe etc. Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. Rep. 96, 44 L. ed. 136, the following language was used by Justice Peckham in delivering the opinion of the supreme court of the United States: "We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made."

It may be said in this connection that the determination of the question whether or not a contract is in restraint of trade is to be arrived at in exactly the same way and under exactly the same rules, whether the case falls under the provisions of the act of Congress or under the rules of the common law. The difference between the act and the common law does not lie in the manner of ascertaining whether or not restraint exists, but in the degree of restraint required to render the contract illegal. Under the act of Congress, any restraint is illegal, while under the common law only unreasonable restraint is illegal.

In *Horner v. Graves*, 7 Bing. 735, the English doctrine is stated as follows: "We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether the restraint

523 is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

In the case of *United States v. Addyston Pipe etc. Co.* 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122, in the circuit court of appeals, Judge Taft, in delivering the opinion of the court, gave an able exposition of the principles of the common law touching this subject. Certain rules are there laid down for testing a contract as to its being in unreasonable restraint of trade at the common law. It was there held: "No contractual restraint of trade is enforceable at common law unless the covenant embodying it is merely ancillary to some lawful contract (involving some such relations as vendor and vendee, partnership, employer and employé), and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard for determining the reasonableness and validity of the restraints. But where the sole object of both parties in making the contract is merely to restrain competition, and enhance or maintain prices, the contract is void." Judge Taft, after stating five classes of contracts or covenants in restraint of trade at common law, says: "It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced, unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. . . . This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is

<sup>524</sup> merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: 1. Because it oppresses the covenantor, without any corresponding benefit to the covenantee; and 2. Because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster."

Mr. Freeman, in his note to the case of *Harding v. American Glucose Co.*, 74 Am. St. Rep. 189, discussing the rule laid down by Judge Taft, says: "This doctrine, we believe, would prove sufficient to deal with most cases of contracts restricting competition and forming unlawful trusts, with this extension of the rule, which the cases seem to warrant, viz., that, even though there be an apparent main lawful contract, yet if its obvious purpose and necessary results are to establish a monopoly, the contract is void. The rule as stated by Judge Taft seems capable of this extension."

It is deducible from the authorities that, if the direct and necessary or natural effect of a contract or combination among producers and sellers of a commodity is to restrain competition and control prices to the injury of the public when all the powers of the contract or combination shall have been <sup>525</sup> exercised, the contract or combination is in

unreasonable restraint of trade and against public policy. It is unnecessary to enter into a long and tedious enumeration of the many ways in which these ends may be accomplished. Such enumeration would simply encumber the record.

It is no defense to the illegality of a contract or combination which is in unreasonable restraint of trade to show that in the particular case a complete monopoly has not been formed, or that no control of prices has been exercised, or that prices have been lowered and not raised: *United States v. Addyston Pipe etc. Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; *Brannon's Fourteenth Amendment*, 378; 20 Am. & Eng. Ency. of Law, 850. If a contract or combination in unreasonable restraint of trade could not be attacked until a complete monopoly had been formed, then the law against monopolies would be unavailing. In this country it would be almost impossible to combine all the interests in any line of industry into a single and complete monopoly. If only complete monopolies could be reached under the law, a combination could then be formed tending to monopoly and embracing substantially all the evil results of a complete monopoly, intentionally leaving out of the combination some one or more of those engaged in the industry, for the very purpose of rendering the combination legal.

A contract which is charged to be in restraint of trade is not to be tested by what has been done under it, but by what may be done under it; not by its performance, but by its powers of performance when fully exercised: *Page on Contracts*, sec. 433; *Morris Run Coal Co. v. Barclay Coal Co.*, 18 Pa. 173, 8 Am. Rep. 159; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790.

Many of the later authorities draw a distinction between contracts which were in "restraint of trade," as that phrase was understood in the early history of the common law, and contracts which are in "restraint of competition," and which are also in restraint of trade, as understood in modern times: *Eddy on Combinations*, sec. 720; *Freeman's note*, 74 Am. St. Rep. 189. Both classes of contracts, when unreasonable and to the injury of the public, are alike legal and against public policy. The illegality of a contract or combination for the restraint of competition does not lie in the agreement not to compete, but in its reflex

injury to the public. One way to control prices is to destroy or restrain competition. It has been said that <sup>526</sup> many of the cases decided in America, holding contracts valid as not being in unreasonable restraint of trade, would have been held otherwise if the modern doctrine as to restraint of competition had been properly applied.

In passing upon a contract claimed to be in restraint of trade, whether the parties agree to refrain from trade or from competition, the courts have endeavored to concede the greatest liberty of contract consistent with the public good. Yet the constitutional liberty of contract has never been held to give to parties the right to contract contrary to public policy and to have such contract respected by the courts.

In the case at bar, it appears that contract A was the first step in the transaction disclosed by the bill. Contract A provides for the execution of contract B by each of the parties to contract A. B is the result and final consummation of A. Both are parts of one arrangement and one transaction, and must be considered together: *George v. Cooper*, 15 W. Va. 666; *Cobb v. Glenn Boom etc. Co.*, 57 W. Va. 49, 110 Am. St. Rep. 734, 49 S. E. 1005. Contract A provides for the incorporation of appellee, and how its shares and profits shall be distributed among the parties to contract A. Certain regulations for the management and operation of the appellee were made by the parties to contract A, before the appellee came into existence. Who its incorporators were does not appear—presumably persons interested in the parties to contract A. The allotment of the stock of appellee to each of the parties to contract A was upon condition that such party should make with appellee a three-year contract for the sale by it of all coke produced by such party at a commission of five cents per ton on the coke sold, and upon the further condition that no stock subscription in appellee should be accepted from any party until such three-year contract as to coke produced by it should have been made and entered into. The stock of appellee held by the parties to contract A was to be in the hands of trustees, and if any stockholder should decline to renew the three-year contract the stock of such stockholder was to be sold to appellee at its book value. Pursuant to contract A appellee came into existence, governed and controlled by that contract so far as could be done by

such a contract. It may be contended that, as appellee when incorporated was a separate legal entity, empowered to sue and be sued, and was not a <sup>527</sup> party to contract A, it was not bound by that contract. The answer to this contention is that contract A was made with all the stockholders of appellee, and bound them so far as such contract could bind them; and we are considering the contracts, for the purpose of the question here involved, as if carried out. The stockholders, not in name but in reality, are the owners of the rights and property of an incorporated company. They elect its directors and provide for its management: *Moore v. Schoppert*, 22 W. Va. 282; *Sweeney v. Grape Sugar Refining Co.*, 30 W. Va. 443, 8 Am. St. Rep. 88, 4 S. E. 431; *Lamb v. Pannell's Admr.*, 28 W. Va. 663. By contracts A and B, the appellee was made the sole and exclusive sales agent of the parties to said contracts. No price was specified at which sales were to be made. This was left to the appellee. It agreed to use its best efforts to sell at the best price the market afforded. By contract B it was provided, "And the party of the first part further agrees that it will manufacture such coke in accordance with the rules now or hereafter established and promulgated by the party of the second part." Under these contracts, the appellee was empowered not only to fix the price at which sales should be made, but to prescribe the quality of the production. An average price for coke was to be received by each of the parties for its product, except for inferior coke. For the purposes of these contracts, the twenty coke manufacturing and producing corporations were welded into a single concern so far as the market was concerned, without any endeavor to transfer their several properties. We do not think that anyone can carefully read the two contracts, in the light of the allegations of the bill, without coming to the conclusion that the appellee, the new corporation, was merely an instrument or means to an end, operated, owned and controlled by the twenty corporations parties to contract A. Every act of this new agent corporation within the powers of these contracts is merely the act of the twenty corporations in conjunction. The practical effect is that the majority of the stock of appellee, which is apportioned among the twenty corporations according to the ovens owned by them, controls its operations. Each of the parties to contract A has a voice in the control of the appellant to the extent only

of the stock of such party, which, unless a majority, is insufficient to control. If one of these corporations has a majority <sup>528</sup> of stock, it may fix the selling price not only of its own production, but of the production of the others by controlling the agent corporation. If one of these corporations has less than a majority, it may not control the selling price of its own production or the price of the production of any of the others. The effect of the combination created by means of the contracts mentioned would not be different if the twenty corporations had agreed to exercise the powers conferred by the contracts in conjunction in their own names without an agent, or if a natural person had been made the agent instead of the new corporation. It may be said that the agent corporation agrees to guarantee the price to each of the parties; but, in its analysis, it is the guaranty of an incorporated company, the stockholders of which are the twenty corporations mentioned.

It clearly appears to us that all competition is destroyed among the twenty corporations by these contracts and this combination, and that they tend to restrain competition between the twenty corporations and others engaged in the same business. Illustrating how competition is destroyed among the twenty corporations, let us suppose that a contract for furnishing coke is to be let at a given time and place. Who is to be there to represent each of the twenty corporations separately in competition for that contract? Evidently no one, for this is an exclusive agency. The agent of the combination is to be there; but is it to be there for the purpose of having these several corporations compete with each other? No; it is to be there for the purpose of acting as agent for the combination, making a single negotiation for the contract without competition among these corporations.

It is argued that it has not been held unlawful for two or more competitors in the same business to employ the same sales agent. That is a different question. When a number of competitors, acting independently, employ the same agent, the agent acts independently for each. No one of the competitors has any control over the agent so far as the sale of the production of the others is concerned. While it may not have been held that competitors cannot employ the same agent, it is a different proposition for competitors to enter into a contract or contracts in effect to act in con-



junction for <sup>529</sup> all the competitors in the sale of the production of all, and to restrain competition and control prices.

It may be claimed that the restraint of trade shown in this case is only incidental and commensurate to a main object of the contract lawful in itself. The purpose of this transaction, as stated in contract A, is as follows: "Whereas it is deemed expedient that there should be some arrangement perfected to improve conditions in the manufacture, inspection and shipment of coke, and to regulate and to improve the quality of coke manufactured in the district mentioned." Conceding for the sake of argument that the purpose stated is lawful, we are not limited, in ascertaining the real purpose of the contract, to a consideration of the purpose stated: Noyes on Intercorp. Relations, sec. 355; People v. North River Sugar Refining Co., 54 Hun. 354, 7 N. Y. Supp. 406; 11 Coke, 84. If all that was necessary in order to render legal a contract otherwise illegal, because in unreasonable restraint of trade, were to state in the contract a legal main purpose, such statement would furnish an easy evasion of the law. Under the rule laid down by Judge Taft, was the restraint only ancillary and commensurate to a lawful main purpose, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect it from an unjust use of those fruits by the other party? We are clearly of the opinion that it was not necessary, in order to arrange for the improvement of conditions in the manufacture, inspection and shipment of coke, and in order to regulate and improve the quality of coke manufactured by said corporations or in said field, for the said corporations to form a trust or combination, the direct effect of which is to destroy all competition among them, to pool their production and to cause them to enter the market for the sale of their combined production as a single concern and which tends to restrain competition between them and others engaged in the same business. Nor was such protection necessary to any other lawful purpose disclosed by the contracts, in view of the facts appearing.

It is pointed out that contract B contains the following provision: "Provided, however, that, whereas the party of the second part has made or may make arrangements or contracts to act as the selling agent for other producers of coke  
30 than the party of the first part, therefore the party of

the second part shall only be required to take such quantity of coke from the parties for whom it acts as agent, as railroad facilities may be furnished to transport, and the party of the second part shall also only be required to take such quantity of coke from all persons whom it represents as agent as market conditions will enable it to dispose of at or above the cost of production." It is insisted that this provision relieves the contract from the charge that it restrains competition among the twenty corporations. If there is any virtue in the argument, it affects only the question of production. It may be plausibly argued that the contracts do not restrain production so long as the coke may be sold at cost; but we cannot see that such provision in any way prevents the destruction of competition in the market. It is the duty of the appellee to sell down to cost if necessary, but it is likewise its duty to sell at the best price the market affords. These duties are embodied in a private contract between the parties; and it is neither natural nor probable that this agent (appellee) would present this private contract, showing that it must sell at cost if it cannot get more, or make the contents of the contract known to contemplated purchasers, when negotiating sales to them. Again, is there any competition among these twenty corporations in any sale made by the agent above cost? Certainly not. We think that it would be a very rash conclusion to say that this combination was made, and that these corporations are operating alone for the purpose permanently of selling at cost and no more. It must be conceded, also, that the effect of this provision is to destroy all competition below cost; or, as claimed, that it operates against destructive competition. It is argued, however, that this is lawful, and that the public cannot compel competition below cost. The public cannot compel competition at all; but the law, in the interest of public policy, can and will remove unreasonable restraints by contract upon competition, by refusing to enforce the contract and leaving the parties free to compete if they choose. The fact that the purpose of a contract is to avoid destructive competition will not save it from illegality if it is in unreasonable restraint of trade: *United States v. Addyston Pipe etc. Co.* 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122. Other cases might be cited.

531 It is claimed that this contract cannot be declared illegal because it does not appear what part or per cent of the total production of the Pocahontas Flat Top Coal Field is produced by the twenty corporations. It is said that together they may produce only one per cent of the total production of the field. As we have said before, it is not essential that the monopoly be complete before it is illegal. Unreasonable restraint of trade which is only partial is illegal: *Charleston Gas. Co. v. Kanawha Gas. etc. Co.*, 58 W. Va. 22, 112 Am. St. Rep. 936, 50 S. E. 876. As to this feature of the case, and upon the question of the reasonableness of the restraint of trade, we are assisted in reaching our conclusion by cases previously decided by this and other courts. In the case of *Slaughter v. Thacker Coal etc. Co.*, 55 W. Va. 642, 104 Am. St. Rep. 1013, 47 S. E. 247, 65 L. R. A. 342, the combination was composed of only three coal companies, and the contract was held illegal and void, because it tended to suppress competition and restrain trade, contrary to public policy. In *Charleston Gas Co. v. Kanawha Gas etc. Co.*, 58 W. Va. 22, 112 Am. St. Rep. 936, 50 S. E. 876, a contract between two gas companies, restraining competition and controlling prices, was held illegal. In the case of *Chesapeake etc. Fuel Co. v. United States*, 115 Fed. 610, 53 C. C. A. 256, the combination was among fourteen firms, persons and corporations producing and dealing in coal, and the combination was held illegal under the act of Congress, and, according to the principles there announced, would no doubt have been held illegal under the common law. Attention might be called to the fact that, in the statement of the purpose of the combination contained in contract A, the power to control the district mentioned (the Pocahontas Flat Top Coal Field) is assumed for the purposes of the contract. The contract expressly assumes the power for its purposes to "regulate and improve the quality of coke manufactured in the district mentioned." Whether or not these corporations were in error as to the extent of their power, we do not know. It is sufficient to say that they assume power over the district by their contracts.

We can but conclude that the combination established by contracts A and B is in unreasonable restraint of trade and against public policy, and that, when all the powers of the contracts are exercised, the direct and necessary or natural effect is to restrain competition and control prices; that such

effect is not merely incidental, commensurate or necessary to <sup>532</sup> the protection of the parties in the enjoyment of the legitimate fruits of a lawful undertaking.

It is claimed that the motion to dissolve the injunction should not have been heard, because the defendant was then in contempt for violating the injunction. We have examined the affidavits on this subject, and cannot see that the judge of the circuit court was in error in hearing the motion. Inasmuch as contract B, which constitutes the basis of this suit, is void, because against public policy, there is no equity in the bill, and for this reason the motion to dissolve should have been sustained. Another reason for sustaining in part the motion to dissolve is that, so far as the injunction was mandatory, compelling the delivery and transfer of property to the appellee pending the suit and without notice, the injunction was void and without due process of law, as fully indicated by the decision and opinion of this court in the prohibition case of Powhatan Coal etc. Co. v. Ritz, recently determined by this court.

For the reasons stated, the order of the judge of the circuit court overruling the motion of appellant to dissolve the injunction is reversed, and the motion sustained, and this cause remanded to be further proceeded with in accordance with the principles herein announced and the rules governing courts of equity.

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*Unlawful Trusts and Monopolies* are discussed in the note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235; and in the recent cases of *White Star Line v. Star Line of Steamers*, 141 Mich. 604, 113 Am. St. Rep. 551; *Standard Oil Co. v. Doyle*, 118 Ky. 662, 111 Am. St. Rep. 331; *Getz Bros. & Co. v. Federal Salt Co.*, 147 Cal. 115, 109 Am. St. Rep. 114; *Keene Syndicate v. Wichita Gas etc. Co.*, 69 Kan. 284, 105 Am. St. Rep. 164; *Monongahela River etc. Coal Co. v. Jutte*, 210 Pa. 288, 105 Am. St. Rep. 812; *Slaughter v. Thacker Coal etc. Co.*, 55 W. Va. 642, 104 Am. St. Rep. 1013. Any combination of competing corporations the necessary consequence of which is the controlling of prices or limiting production or suppressing competition in such a way as to create a monopoly, is contrary to public policy and void: *Charleston Gas Co. v. Kanawha Gas Co.*, 58 W. Va. 22, 112 Am. St. Rep. 936. The true test of the validity of a contract or combination between corporations or other persons to fix the price and control the supply of a commodity is whether it affords only a fair and just protection to the parties, or whether it is so broad as to interfere with the interests of the public. If the former, it is valid; if the latter, it is void: *Finck v. Schneider Granite Co.*, 187 Mo. 244, 106 Am. St. Rep. 452.

## METZ v. STARCHER.

[60 W. Va. 657, 56 S. E. 196.]

**TAX TITLES—Necessity of Delinquent Tax List.**—There must be a delinquent tax list before there can be a valid sale of land for delinquent taxes and a valid deed thereto. (p. 926.)

**TAX TITLES—Delinquent List as Evidence.**—The delinquent tax list is not only the evidence of delinquency, but it is also the record notice of delinquency to the owner of the land. (p. 928.)

**TAX TITLES—Delinquent List—Sufficiency of.**—A paper not purporting to be a delinquent tax list, and not containing the heading required therefor or other sufficient heading, and containing no means of identifying as a delinquent tax list to an ordinary person is not sufficient, and a tax sale and deed based thereon may be avoided by the owner of the land sold. (p. 929.)

T. P. Jacobs and D. D. Johnson, for the appellee.

W. M. Parsons and Mollohan, McClintic & Mathews, for the appellees.

<sup>658</sup> COX, J. On the eleventh day of August, 1900, Elma Perkins and others, by Okey Johnson, their attorney in fact, in consideration of two thousand five hundred dollars, conveyed to the plaintiff, Georgia Metz, eighty and one-half acres of land in Ravenswood District in Jackson county. For the years 1901, 1902, and 1903 the taxes on this land were assessed against, and paid by, her. This land was sold for taxes claimed to be delinquent for the year 1900, assessed against Elma Perkins et al., and was purchased by the defendants, Starcher et al. A tax deed therefor was made by the clerk to them, and recorded on the twentieth day of January, 1904. At July rules, 1904, the plaintiff filed her bill in the circuit court of Jackson county to set aside the tax sale and deed, and to enjoin the defendants from interfering with her ownership of the land, alleging therein a previous tender to, and refusal by, defendants of the amount of money required as a condition precedent to setting aside the deed by section 25, chapter 31, of the Code of 1899, and making an offer of payment of said amount into court. The circuit court, upon final hearing, dismissed the plaintiff's bill, and she appeals.

One of the grounds alleged for setting aside the tax sale and deed is that there was no sufficient delinquent list showing this land delinquent for the nonpayment of the taxes for

the year 1900. Section 18, chapter 30 of the Code of 1899, requires the sheriff to make out a list of real estate delinquent for the nonpayment of taxes, and provides the form thereof, and that the heading thereof shall read: "List of real estate in the county of \_\_\_\_\_, delinquent for the nonpayment <sup>650</sup> of taxes thereon for the year \_\_\_\_." Section 21 of the same chapter requires the lists to be returned to the county court for examination, and, when found correct, that the court shall direct the clerk to certify copies to the auditor, and that the original lists shall be preserved by the clerk, and that the list of real estate delinquent shall be recorded in a well bound book to be kept by him for the purpose.

The curative provision of our statute—section 25, chapter 31 of the Code of 1899—provides in substance that when the purchaser of real estate at a tax sale shall have obtained and caused to be recorded a deed therefor, such right, title and interest, etc., shall be transferred to and vested in such purchaser, notwithstanding any irregularity in the proceedings under which the same was sold, not therein provided for, unless such irregularity appear upon the face of such proceedings of record in the office of the clerk of the county court, and be such as materially to prejudice and mislead the owner of the real estate so sold, as to what portion of his real estate was so sold and when and for what year or years it was sold, or the name of the purchaser thereof, etc., and, further, that no irregularity, error or mistake in the delinquent list, or the return thereof, or in the affidavit thereof, shall, after the deed is made, invalidate or affect the sale or deed. A delinquent list is, by said section 18, chapter 30 of the Code, expressly required to be made. Said section 25, chapter 31, broad as it undoubtedly is in its curative effect, implies that there shall be a delinquent list. It professes to cure irregularities, errors and mistakes in the delinquent list, which cannot be unless there is a delinquent list to cure. It has not been held that a delinquent list may be entirely dispensed with and a valid tax sale take place. The delinquent list is the foundation of the proceeding to sell for delinquent taxes—the evidence of delinquency. It was so held in *Mosser v. Moore*, 56 W. Va. 478, 49 S. E. 537.

The paper which is the original delinquent list, if there be one, upon which the sale of this land was predicated, is brought here in its original form and condition, from the

office of the clerk of the county court. Across the face of this paper, and over the place where the heading of a delinquent list should appear, is a strip of stiff pasteboard, securely <sup>680</sup> fastened to the paper by means of metallic rivets, concealing the entire heading required by the statute, except that upon close inspection the words "nonpayment of taxes thereon for the year 1900" may be seen. By an unusual and extraordinary effort, the pasteboard may be so raised from the paper that the remainder of the heading required by the statute may be seen angularly, except that some of the letters of some of the words would still remain partially concealed. Otherwise, the paper is substantially in form a delinquent list. It is not claimed that the pasteboard was so placed and fastened with any improper intent, or for any improper purpose. It is claimed by plaintiff, however, that this defect and concealment of the heading invalidates the list, and renders it a nullity. If this defect is a mere irregularity, error or mistake in the list, it is cured after deed by said section 25, chapter 31. If, on the other hand, it is such a vital defect as renders this paper in law not a delinquent list, and that defect appears from the face of the record, then it is not cured, and the whole proceeding to sell plaintiff's land for delinquent taxes fails.

What purports to be an office copy of the delinquent list for the year 1900, so far as it relates to this land, from the record in the office of the clerk of the county court of Jackson county, is found in the record. This copy appears to contain the full heading required by the statute. How the clerk came to record the full heading in connection with this paper does not appear. The paper and pasteboard do not appear to have been severed, but probably the clerk arrived at the heading by the unusual and extraordinary method above indicated.

It is not necessary for us to say whether or not at all times after this original paper, which is before us, was examined and found correct as a delinquent list by the county court of Jackson county on the eighteenth day of July, 1901, it was itself the record in the office of such clerk. It is sufficient to say that, from the time it was so found correct until it was actually recorded in the book kept for that purpose it was the only record in the office of the clerk. Therefore, a fatal defect in the original must be treated by us as appearing on the face of the record. This being true, we are <sup>681</sup> left to the inquiry

whether this is a vital defect rendering this original paper void as a delinquent list, or a mere irregularity, error or mistake cured by statute.

The delinquent list is not only the evidence of delinquency, but it is the record notice of delinquency to the owner of the land: *Mosser v. Moore*, 56 W. Va. 478, 49 S. E. 537. See, also, *Barton's Heirs v. Gilchrist*, 19 W. Va. 223; *Simpson v. Edmiston*, 23 W. Va. 675; *McAllister v. Cottrille*, 24 W. Va. 173. Judge Brannon, speaking for the court in *Mosser v. Moore*, 56 W. Va. 478, 49 S. E. 537, in reference to the sale list, says: "Not only must there be such a list, because required by law, but it must have requisites of legal certainty, like assessment and delinquent lists." The statute says that the heading of the delinquent list of real estate shall read as therein provided. Without the heading, a list otherwise in proper form would not show that the lands mentioned on the list were delinquent for the nonpayment of taxes for any year, or in what county or state they were returned delinquent. Without the heading, it would not even purport to be a delinquent list. If there must be a delinquent list, then a paper which does not purport to be a delinquent list, and does not contain the heading required by the statute, or other sufficient heading, and which contains no means of identifying it as a delinquent list to a person of ordinary business ability and understanding, is in law no delinquent list; and no notice to the owner of the land or other person interested, and no foundation for a tax sale. The original paper here presented without the heading is but a meaningless conglomeration of words and figures. It is true that by close inspection the words "nonpayment of taxes thereon for the year 1900" appear. These words alone do not show delinquency for any year, and they do not give to the residue of the paper appearing, meaning on the question of delinquency. Should a person of ordinary business ability and understanding go further, and by unusual and extraordinary effort raise the pasteboard, and by unusual skill decipher the residue of the heading? We think not. Nor do we think that the law requires the owner of the land to make such extraordinary and unusual effort in order to free himself from the charge of negligence. A delinquent list, to operate as notice and evidence of delinquency, must be such as reasonably and fairly to evidence <sup>662</sup> the delinquency. Errors, mistakes and irregularities are cured;



but the lack of the fundamental and essential requisites necessary to constitute a delinquent list is not cured by the statute, when such lack or failure appears on the face of the record and is such as materially to prejudice and mislead in the respects named in the statute. We cannot say that a person of ordinary business ability and understanding, being handed the paper before us, would be informed as to the delinquency of his land mentioned thereon, and as to the year it was returned delinquent. This paper is the uncontrovertible evidence of its own nullity. It is not in law a delinquent list. It is not in law notice of delinquency. This appears on the face of the record. The defect, amounting to failure of a delinquent list, is such as to prejudice and mislead the owner of the land: *Mosser v. Moore*, 56 W. Va. 478, 49 S. E. 537. We hold that it avoids the tax sale and deed in this case, and that the plaintiff has the right to have the sale and deed set aside, upon payment of the amount required by section 25, chapter 31 of the Code. It is unnecessary to consider any other question raised by the record.

For the reasons stated the decree of the circuit court of Jackson county entered in this cause on the twelfth day of May, 1905, is reversed; and this cause is remanded, with directions to enter, upon payment to defendants or into court of the amount of money required by section 25, chapter 31 of the Code, a decree setting aside and annulling the tax sale and deed complained of in the plaintiff's bill, and to be further proceeded with in accordance with the principles herein announced and the rules governing courts of equity.

**Mr. Justice Poffenbarger Dissented**, and said, in part, that "not regarding this case as being within the principle announced in *Mosser v. Moore*, 56 W. Va. 478, 49 S. E. 537, nor as differing from the numerous cases in which tax deeds have been upheld against irregularities, I am unable to concur in the decision. . . . The most that can be said against the delinquent list here involved is, in my opinion; that it was, because of its irregularity and erroneousness, calculated to mislead the owner and presumably did so. I do not see how it can be said there was no list. It was possible by careful examination and inspection to see a complete list. The thing which rendered closeness of inspection necessary to do this was simply an obscuration, which could not, either in fact or law, render nonexistent the list to which it was attached. Concealment or obscuration of a thing does not destroy or render it nonexistent."

*The Principal Case* is supported by a previous decision of the same court in *Mosser v. Moore*, 56 W. Va. 478, 49 S. E. 537. For authorities from other courts on the questions involved in the principal case, see *State v. Hurt*, 113 Mo. 90, 20 S. W. 379; *Kelly v. Craig*, 27 N. C. 129; *Isaacs v. Wiley*, 12 Vt. 674.

# CASES

## IN THE

# SUPREME COURT

OF  
WISCONSIN.

WILBERT v. SHEBOYGAN LIGHT, POWER AND RAIL-  
WAY COMPANY.

[129 Wis. 1, 106 N. W. 1058.]

**ELECTRICITY—Duty of Persons Using—Negligence.**—If a wire has been attached to a tree as a brace and fastened at the other end to a guy post in such manner as to be in contact with the guy wire of an electric light pole, and thus becomes charged with electricity escaping through a defective insulator from an electric lamp to the span wire and thence to such guy wire, whereby a person is killed by coming in contact with the tree wire, the electrical company is liable therefor, provided such defective conditions had existed for such a length of time that the company ought to have discovered and remedied them before the accident. In such case the existence of the tree wire is not such an extraordinary condition as not to have been reasonably apprehended in the conduct of the company's business. (p. 932.)

**ELECTRICITY—Duty of Persons Handling.**—The danger incident to the use of electricity is imminent and lurking in character, and a high degree of watchfulness for the prevention of accidents is imposed on persons handling it, and the watchfulness needed to prevent accidents should take into account the acts of strangers and the public generally. (pp. 933, 934.)

Action to recover for the death of a traveler lawfully upon the highway, and caused by his coming in contact with a live wire attached to a tree and acting as a brace to keep it upright.

W. Williams, W. M. Wheny, Jr., and W. O. Morgan, for the appellant.

S. Gillen and E. R. Veech, for the respondent.

5 SIEBECKER, J. Appellant contends that the evidence is insufficient to support the inference that the negligence complained of was the proximate cause of the injury. The plaintiff's claim respecting the defective and dangerous con- (931)

dition, construction and maintenance of the light plant is not controverted, but it is asserted that the defendant had no knowledge that the tree wire had been attached to the guy wire and post, or that the lamp insulator by cracking had become defective and unsafe, thus permitting the electric current to escape from the lamp to the span and guy wires and thence to the tree wire. The jury found that these conditions of the plant made the street at the place of accident dangerous to persons using it for the ordinary purposes of travel, and that these dangerous conditions had existed a sufficient length of time before the accident for the defendant, in the exercise of ordinary care and diligence, to have discovered and remedied them. It is not questioned but that these defects and the dangerous condition of the street existed at the time of the accident, as claimed; but it is urged that the proof is insufficient to show that the insulator near the lamp had been out of repair for a sufficient length of time to charge the defendant with negligence in not having discovered it before the accident occurred. There is evidence tending to show that a few hours after the accident tests were made by defendant to ascertain whether the guy wire was charged with an electric current, and that it became so charged when, by raising the lamp to its full height, the locking device of the lamp attached to the span wire interlocked, indicating that the electric current charging the span, guy and tree wires came from the lamp through the defective insulator immediately above it. There is evidence to the effect that, in the evening before the accident, electric sparks were observed among the tree branches, near the span and guy wires, and at points some distance from the pole, <sup>6</sup> along the wires leading to this pole which supported the span and guy wires. Several witnesses testified that they had observed the branches of trees near to and in contact with these wires, and had seen parts of branches lying on the ground below, the ends being burned and charred and some of them having depressions burned into them, indicating contact with heat. It also appears that the voltage of the current was of such high potential that, if it passed to these wires, it would heat them. The time during which this burning was testified to have occurred covered a period of several weeks. The evidence tends to show that there was nothing in the appearance of things to indicate that the defective condition of the insulator may not have ex-

isted for a considerable time before the accident. There was no conflict in the proof as to the sparks of electricity among the wires at the pole and the burning of the twigs and branches. In view of the nature of the business and the circumstances of the case, we are of the opinion that the jury were justified in their inference that the defect in the insulation had existed for a sufficient time for the appellant, in the exercise of ordinary care in the conduct of the business, to have discovered and repaired it before the injury happened.

It is also contended that there is no basis for the jury's finding that defendant, in the exercise of reasonable care, ought to have discovered the dangers which caused Wilbert's death, and to have removed them before the accident, upon the ground that the existence of the tree wire was an intervention not within reasonable apprehension in the ordinary course of events. If the existence of the tree wire was not within the field of reasonable apprehension, then appellant's contention is well founded, for it cannot be charged with negligence respecting the existence of a condition not reasonably to be anticipated in the course of events. The question, therefore, is whether, under the facts and circumstances proven, the existence of this tree wire was an intervention such as appellant should reasonably have apprehended as likely to exist. To say that a condition is reasonably to be apprehended does not imply that the exact condition proven as to the erection of this tree wire was to have been expressly contemplated, but it implies that a dangerous condition, in the nature of this one, was likely to arise in connection with the conduct of appellant's business. The danger incident to the use of electricity is imminent and lurking in character, and a high degree of watchfulness for the prevention of accidents is imposed on persons handling it. This court, referring to the care required of those handling electricity and the lurking danger to one coming in contact with live wires, stated, in *Nagle v. Hake*, 123 Wis. 256, 101 N. W. 409: "From the very fact of these known dangers . . . [a person] must necessarily be charged with a higher degree of caution and diligence than one who is dealing with sticks and stones which can convey no such concealed death stroke": *Fitzgerald v. Edison E. I. Co.*, 200 Pa. 540, 86 Am. St. Rep. 732, 50 Atl. 61; *Mitchell v. Raleigh E. Co.*, 129 N. C. 166, 85 Am. St. Rep. 735, 39 S. E. 805, 55 L. R. A. 398.

The watchfulness needed to prevent such accidents should take into account the acts of strangers and the public generally. As above stated, we are of the opinion that the evidence warrants the inference drawn by the jury, that, if appellant had exercised reasonable care and diligence, it would have discovered the defective insulator, and that the electric current was escaping to the connecting guy and span wires, and in the performance of this duty it would in all reasonable probability have observed the existence of this tree wire and the dangers incident to it. From this it must follow that the existence of this tree wire was not such an extraordinary and unusual condition that it can be said that, as a matter of law, it was not reasonably to be apprehended in the conduct of appellant's business. Under the circumstances the court properly held that the evidence supported the finding that the defendant, in the exercise of ordinary care, ought to have discovered the defects and dangers complained of, and to have removed them before Wilbert's death. The following adjudications have a bearing on this subject: *Kellogg v. Chicago etc. R. Co.*, 26 Wis. 223, 7 Am. Rep. 69; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 50 Am. Rep. 352. 18 N. W. 764; *Brown v. Chicago etc. R. Co.*, 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911; *Meyer v. Milwaukee E. R. & L. Co.*, 116 Wis. 336, 93 N. W. 6; *Cary v. Preferred Acc. Ins. Co.*, 127 Wis. 67, 115 Am. St. Rep. 997, 106 N. W. 1055, 5 L. R. A., N. S., 926; *Morey v. Lake Superior etc. R. Co.*, 125 Wis. 148, 103 N. W. 271; *Gilman v. Noyes*, 57 N. H. 627; *Lane v. Atlantic Works*, 111 Mass. 136; *Lowery v. Manhattan R. Co.* 99 N. Y. 158, 52 Am. Rep. 6, 1 N. E. 608; *Jensen v. The Joseph B. Thomas*, 81 Fed. 578; *McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464.

We are of the opinion that the trial court properly awarded judgment on the special verdict.

By the COURT. Judgment affirmed.

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*The Duty and Liability of Electric Corporations in the maintenance of their wires* are discussed in the note to *Hebert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 515. Generally speaking, such corporations are held to the highest degree of care practicable with the operation of their plants: *Fisher v. New Bern*, 140 N. C. 506, 11 Am. St. Rep. 857; *Guinn v. Delaware etc. Tel. Co.*, 72 N. J. L. 276, 111 Am. St. Rep. 668, and cases cited in the cross-reference note thereto

## GOLDEN v. MEIER.

[129 Wis. 14, 107 N. W. 27.]

**EVIDENCE, PAROL, to Prove Condition Precedent.**—Parol evidence is admissible to show that a written contract not under seal was not to become binding until the performance of some condition precedent, although the contract names other conditions precedent, not repugnant to the one sought to be shown, to its becoming operative and taking effect. (pp. 936, 937.)

T. M. Casey, for the appellants.

F. M. White, for the respondents.

<sup>16</sup> KERWIN, J. The only question necessary to consider on this appeal is whether evidence was properly admitted to show that it was agreed at the time respondents, or some of them, affixed their signatures to the written agreement that it should not become binding or effective for any purpose until the appellants had obtained from the signers of such agreement a pledge in writing to furnish for the use of the creamery mentioned <sup>17</sup> in the agreement, when erected, the milk from two hundred and fifty to three hundred and fifty cows. It is claimed on the part of the appellants that the evidence offered that the agreement signed was not to go into effect until such pledge was obtained was not admissible, since the contract in question is complete and contained the provision "that the parties of the first part shall consist of not less than thirty-three members, whose names shall be subscribed hereto, before this agreement shall become operative and take effect upon either party." It is contended that the provision in the written agreement to the effect that it shall not be valid until signed by thirty-three members precludes testimony of any condition precedent to the taking effect of the agreement. Counsel relies wholly upon *United E. & C. Co. v. Broadnax*, 136 Fed. 351, 69 C. C. A. 177, which case he says is the only one he has been able to find passing upon the exact question here. It is true the *Broadnax* case appears to support the contention of appellants to the effect that, where the written instrument enumerates conditions precedent to its validity, it will be presumed that the written enumerations are exhaustive and that parol evidence to add to them should be excluded. This case, however, appears to be out of harmony with the case of *Ware v. Allen*, 128 U. S. 590,

9 Sup. Ct. Rep. 174, 32 L. ed. 563. Counsel for appellants attempts to distinguish *Ware v. Allen* from the *Broadnax* case (136 Fed. 351, 69 C. C. A. 177). In *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. Rep. 174, 32 L. ed. 563, the agreement provided in terms that it should be void if the promisor should be defeated in a certain suit, but in other respects was a valid binding obligation. Yet it was held that evidence was admissible to show that before the paper was signed it was understood that the agreement was to be of no effect unless, upon consultation with certain parties, the promisor was assured that certain proceedings involved in the transaction were lawful. So it will be seen that this case on principle is in substantial conflict with the *Broadnax* case, and holds that, notwithstanding there were conditions in the contract to the effect <sup>18</sup> that it should be valid only upon certain contingencies, still other conditions precedent to its validity might be shown. At page 595 of 128 U. S. (9 Sup. Ct. Rep. 176, 32 L. ed. 564), the court said: "We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or be ascertained thereafter."

But it is not necessary to consider here the admissibility of evidence to prove a condition precedent wholly repugnant to the expressed terms of the agreement in question, since the evidence offered is not in conflict with such agreement, but is independent of or collateral to it. If the condition precedent be performed according to the terms of the condition sought to be proved by parol, the writing will have full force and effect according to its terms. If the condition precedent be not performed, then the contract will never have vitality or become a binding agreement. If the pledge in writing be furnished by the plaintiffs, then the agreement in writing, according to its expressed terms, when signed by the thirty-three members, will have full force and effect.

The question in this class of cases is not, however, whether the condition sought to be proved is in conflict with or varies



the writing, but whether the written paper purporting to be a contract shall ever take effect as such. Proof of the nonperformance of the condition precedent has the effect of establishing the fact that the writing purporting to be a contract never in fact took effect as such. It is well settled both in England and this country that parol evidence is admissible to show that a written contract not under seal, although manually delivered, was not to become a binding or valid contract until the <sup>19</sup> performance of some condition precedent. The purpose of such evidence is to show that the written instrument was not, except in the contingency named, to become a contract, and that the contingency never happened; and it therefore does not contradict the writing: *Nutting v. Minnesota F. Ins. Co.*, 98 Wis. 26, 73 N. W. 432; *State v. Chamber of Commerce*, 121 Wis. 110, 98 N. W. 930; *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. Rep. 174, 32 L. ed. 563; *Thorne v. Aetna Ins. Co.*, 102 Wis. 593, 78 N. W. 920; *Skaaraas v. Finnegan*, 31 Minn. 48, 16 N. W. 456; *Blewitt v. Boorum*, 142 N. Y. 357, 40 Am. St. Rep. 600, 37 N. E. 119; *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. Rep. 816, 38 L. ed. 698; *Wilson v. Powers*, 131 Mass. 539; *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408; *Benton v. Martin*, 52 N. Y. 570; *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. 127; *Hartford F. Ins. Co. v. Wilson*, 187 U. S. 467, 23 Sup. Ct. Rep. 189, 47 L. ed. 261; 2 *Jones on Evidence*, sec. 478; 2 *Taylor on Evidence*, 8th ed., sec. 1135; *Pym v. Campbell*, 6 El. & Bl. 370. It seems to be firmly established by the foregoing cases and many others which might be cited that "the manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced": *Wilson v. Powers*, 131 Mass. 539. We think this well-settled doctrine rules the case at bar.

Counsel for appellant refers to the language of this court in *Thorne v. Aetna Ins. Co.*, 102 Wis. 593, 78 N. W. 920, to the effect that this rule approaches closely to an infringement upon the principle that a written contract cannot be varied or contradicted by parol, and, therefore, such defense is subject to suspicion. But, conceding that the rule should be cautiously applied and the facts clearly proved, the case at bar is strictly within the rule. The written pledge amounting

to a condition precedent to the validity of the contract was fully proved and found by the jury. The pledge was presented and signed by several at the <sup>20</sup> time the agreement in question was being signed. But the plaintiffs failed to secure a pledge in writing for the product of the number of cows agreed to be furnished, and hence failed to show a performance of the condition precedent necessary to give validity to the contract. It follows that the evidence offered to prove the condition precedent to the validity of the contract was properly admitted, and that the judgment, therefore, must be affirmed.

By the COURT. Judgment affirmed.

Cassoday, C. J., took no part.

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*Parol Evidence* is admissible to show that a writing, in the form of a contract, never became operative as a contract. In other words, a separate agreement, constituting a condition precedent to the attaching of any obligation under the writing, may be shown by parol evidence: *Reiner v. Crawford*, 23 Wash. 669, 83 Am. St. Rep. 848, and see the authorities cited in the cross-reference note thereto.

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### HODGE v. WALLACE.

[129 Wis. 84, 108 N. W. 212.]

**BILLS AND NOTES—Maturity Caused by Failure to Pay Interest is Absolute.**—A note expressly providing that any delinquency in the payment of any interest "shall cause the whole note to immediately become due and collectible," becomes due in case of such delinquency absolutely and not merely at the option of the holder, and a subsequent holder takes it subject to all equities between the original parties to it. (p. 939.)

**DURESS Exists Where One Party, by the unlawful act of another, has been induced to make a contract or perform some other act under circumstances depriving him of the exercise of his free will and by fear of imminent injury to his person or property.** (pp. 942, 943.)

Barry & Barry and Barnes & Magoon, for the appellants.

J. W. Hicks and J. O'Leary, for the respondents.

<sup>87</sup> CASSODAY, C. J. 1. At the close of the testimony the plaintiffs moved the court to direct a verdict in their fa-

vor and against the defendants for the full amount of principal and interest mentioned in the three notes, but subsequently asked leave to withdraw such motion and to withdraw the second <sup>ss</sup> and third causes of action, and renewed their motion to direct a verdict in favor of the plaintiffs and against the defendants for the amount named in the first cause of action, which, by the express terms of the note, became due and payable several months prior to the commencement of the action. The court denied such motions and directed a verdict in favor of the defendants, and counsel for the plaintiffs assign such rulings as errors. The claim on the part of the plaintiffs is to the effect that it appears from the uncontradicted evidence that the plaintiffs became the owners and holders of each of the three notes in good faith and for value and before maturity and in the usual course of business, and hence took the same "free from any defect of title of prior parties, and free from defenses available to prior parties among themselves": Negotiable Instrument Law, secs. 1676—22, 1676—25, 1676—27, Laws 1899, c. 356. On the other hand, it is claimed on the part of the defendants that, by virtue of the stipulation contained in each of the three notes, the whole of the principal and interest named therein became due and payable six days prior to the time when the notes were transferred by Robert Burgess & Son to L. J. Hodge & Son and nearly three weeks prior to the time when they were transferred by L. J. Hodge & Son to the plaintiffs. That stipulation is set forth in the foregoing statement and need not be here repeated. Each note required interest to be paid thereon "at the rate of six per cent per annum from date until paid; interest payable annually." The stipulation is to the effect that "if any payment or part payment, . . . or any interest" thereon, should "become due and unpaid, such delinquency" should "cause the whole note to immediately become due and collectible."

Counsel on both sides refer to adjudications which they claim to be in support of their respective contentions. The case presented is clearly distinguishable from those where the stipulation for accelerating the maturity of the note or notes <sup>ss</sup> on nonpayment of interest or other default is contained in a mortgage or trust deed given to secure the same, and which mortgage or trust deed and notes are construed in some jurisdictions as one instrument in law. In such a case

the note or notes may be transferred without the transferee having any knowledge of such stipulation in the mortgage or trust deed. Here the stipulation is in the notes themselves, and every transferee of the same necessarily took them with knowledge of such stipulation. So the case presented differs from those where one of a series of notes or an installment of interest has become due and unpaid, with no stipulation, as here, that "such delinquency shall cause the whole note to immediately become due and collectible." Thus it was held by this court long ago: "An indorsee of several notes of the same maker, secured by one mortgage bearing the same date, and payable to the order of the same person at different periods, is not chargeable with notice of any equitable defense of the maker against such of the notes as were not due at the time of the indorsement, by reason of the fact that one of the notes was then overdue. Nor is he chargeable with such notice by reason of the fact that the notes bore interest payable annually, and that one year's interest on all of them was due and unpaid at the time of the indorsement": *Boss v. Hewitt*, 15 Wis. 260. To the same effect: *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697; *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10.

These cases do not go to the extent of supporting the contention of the plaintiffs. So the case presented is distinguishable from those where the stipulation for accelerating the maturity of the note or notes contained therein is made optional with the payee or mortgagee or his representatives or assigns: *Schoonmaker v. Taylor*, 14 Wis. 313; *Thorp v. Mindeman*, 123 Wis. 149, 107 Am. St. Rep. 1003, 101 N. W. 417, 68 L. R. A. 146. There is nothing in any of the stipulations or notes here involved to warrant the suggestion that the payees or transferees of any one of them were thereby given such optional right to declare <sup>90</sup> the whole note due and payable on failure to pay the annual interest which by the express terms of each note became absolutely due and payable April 15, 1904. On the contrary, it is expressly and clearly declared therein that "such delinquency shall cause the whole note to immediately become due and collectible." To construe such language as merely optional or permissive would be to destroy the clearly expressed contract which the parties made for themselves and to force upon them a contract to which neither of them ever gave his consent. The terms of

the contract are so clear as to seemingly preclude construction. This may account for the small number of adjudications upon the precise point here presented.

In the absence of such express stipulation, and notwithstanding the rulings in the cases cited, it was held by this court several years ago that "one who takes a promissory note, which shows that interest on the principal sum therein named is past due and unpaid, takes it subject to all equities between the original parties": *Hart v. Stickney*, 41 Wis. 630, 22 Am. Rep. 728. That case followed *Newell v. Gregg*, 51 Barb. 263. To the same effect, *First Nat. Bank v. Forsyth*, 67 Minn. 257, 64 Am. St. Rep. 415, 69 N. W. 909. Such ruling, however, was out of harmony with the decisions of this court already cited, and goes beyond what is necessary to sustain the contention of the defendants in this case, based on such express stipulation. In a much later case bearing upon that question this court held: "The fact that a note bearing interest payable semi-annually was dated, executed and delivered on a certain day fixes the date for the payment of installments of interest at the end of every six months thereafter, and no demand was necessary to create a default": *Zautcke v. North Mil. T. Co.*, 95 Wis. 21, 69 N. W. 978.

It seems pretty well settled that "if the principal of the paper is payable in installments, the paper is considered as dishonored by the failure to pay any one installment when it fell due, whether the entire debt became due on such a failure to pay or not, and a subsequent <sup>91</sup> transferee takes it subject to all the equities": *Tiedeman on Commercial Paper*, sec. 297; *Vinton v. King*, 4 Allen, 562; *Field v. Tibbetts*, 57 Me. 358, 99 Am. Dec. 779; 2 *Randolph on Commercial Paper*, 2d ed., sec. 1047.

But it is said by the same author: "It is doubtful whether the same rule applies to the failure to pay an installment of interest, unless the parties have stipulated that the entire debt shall become due on the failure to pay the interest. Although it has been held that the failure to pay the interest will destroy the negotiability of the paper, with or without this stipulation, the better opinion is that, in the absence of such a stipulation, the failure to pay an installment of interest does not affect the future negotiability of the note or bill."

It was held in Massachusetts more than one hundred years ago: "Upon a note payable in eight years with interest payable annually, an action lies for the interest before the principal is payable": *Greenleaf v. Kellogg*, 2 Mass. 568. To the same effect: *Cooley v. Rose*, 3 Mass. 221; *Walker v. Kimball*, 22 Ill. 537; *Morgenstern v. Klees*, 30 Ill. 422; *Failing v. Clemmer*, 49 Iowa, 104; *Mills v. Jefferson*, 20 Wis. 50.

It is said by Mr. Randolph: "A municipal bond, like a bill or note, may be conditioned on default in the payment of interest, and will, in such case, mature accordingly, although by its terms the principal was not otherwise to become payable for many years. A provision of this sort—e. g., that a note drawing interest annually shall become due on failure to pay the interest—may be contained in a collateral deed of trust or other instrument": 2 Randolph on Commercial Paper, 2d ed., sec. 1048.

So it is said by Mr. Daniel: "Where it is provided in the bonds themselves that, if default be made as to any interest coupon, the bonds shall be due and payable, they so become on default of payment of any coupon": 2 Daniel on Negotiable Instruments, 5th ed., sec. 156a.

Thus it has been held in Georgia: "Municipal bonds, having on their face many years to run, but issued and put in circulation with an indorsement upon each of them to the effect that, in case default be made in paying <sup>92</sup> any of the interest coupons at maturity, then, as a part of the contract, the bond itself shall become due and payable, are legally due, as to the whole of the principal, whenever a default in paying interest according to any of the coupons occurs. Time is of the essence of the contracts": *Mayor v. City Bank*, 58 Ga. 584, following, and to the same effect, *Sneed v. Wiggins*, 3 Ga. 94; *Ottawa N. P. R. Co. v. Murray*, 15 Ill. 336; *Ferris v. Ferris*, 28 Barb. 29. See, also, *Lybrand v. Fuller*, 30 Tex. Civ. App. 116, 69 S. W. 1005; *First Nat. Bank v. Peck*, 8 Kan. 660.

But there are adjudications the other way, notably one particularly relied upon by counsel for the plaintiffs: *Chicago R. E. Co. v. Merchants' Bank*, 136 U. S. 268, 10 Sup. Ct. Rep. 999, 34 L. R. A. 349, affirming 25 Fed. 809. We must hold that, by the express terms of the stipulation and the default in paying the annual interest which became due and payable April 15, 1904, the whole of each note "immediately became due and collectible." It follows from what has been

said that the plaintiffs took the notes after they became due and payable and subject to the equities between the original parties.

2. But we are constrained to hold that it was error to direct a verdict in favor of the defendants. We find no defense established by undisputed evidence. The defense of duress seems to be without foundation so far as the record before us is concerned. What constitutes duress has frequently been stated by this court: *City Nat. Bank v. Kusworm*, 91 Wis. 166, 64 N. W. 843; *Wolff v. Bluhm*, 95 Wis. 257, 60 Am. St. Rep. 115, 70 N. W. 73, 47 L. R. A. 417; *Mack v. Prang*, 104 Wis. 1, 79 N. W. 770, 76 Am. St. Rep. 848, 45 L. R. A. 407; *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495; *Rochester M. T. Works v. Weiss*, 108 Wis. 545, 84 N. W. 866; *Anderson v. Anderson*, 122 Wis. 480, 100 N. W. 829. All the authorities agree that duress exists where one party, by the unlawful act of another party, has been induced to make a contract or perform some other act under circumstances which deprived him of the exercise of free will. In case of duress, the volition of the victim is usually overcome by fear of imminent injury to his person or property, and hence it is a gross species of fraud. Whether duress exists in a particular transaction is usually a question of fact for the jury. But in the case at bar the evidence seems to be insufficient to take that question to the jury. While the evidence may be insufficient to establish mental incapacity by reason of intoxication of one of the defendants, yet it may have been admissible as tending to prove the manner in which his signature was procured. We are constrained to hold that the evidence on the questions of false and fraudulent representations was sufficient to take the case to the jury. Those were the important issues in the case. Such issues were broad, and included not only representations respecting the horse, but the means resorted to and the manner of obtaining the signatures of the respective defendants. All facts and circumstances bearing upon such issues were admissible in evidence. As there must be a new trial upon such issues, we refrain from further discussion of the evidence. The direction of the verdict in favor of the defendants was error.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

*A Note is not Dishonored* by reason of a failure to pay interest prior to the maturity of the principal in the absence of a stipulation to that effect as it fell due: *United States Nat. Bank v. Floss*, 38 Or. 68, 84 Am. St. Rep. 752; note to *First Nat. Bank v. County Commrs.*, 100 Am. Dec. 197. In Minnesota, however, where a note is indorsed before maturity, it is dishonored paper at the time of the indorsement, if interest is then overdue on it and unpaid, which is known to the purchaser. Therefore, the note in his hands is subject to all equities between the original parties: *First Nat. Bank v. For-syth*, 67 Minn. 257, 84 Am. St. Rep. 415.

*What Constitutes Duress* is discussed in the note to *New Orleans etc. R. R. Co. v. Louisiana Construction etc. Co.*, 94 Am. St. Rep. 411.

## CITY OF MADISON v. MADISON GAS AND ELECTRIC COMPANY.

[129 Wis. 249, 108 N. W. 65.]

**INJUNCTION—Abuse of Franchise.**—An injunction will lie at the suit of private parties, to restrain acts in excess and abuse of a corporate franchise and privilege, resulting in private injury. (p. 946.)

**CORPORATIONS—Public Service—Gas Companies.**—The business of supplying gas to meet the demands of the inhabitants of a community, under grant by the state or by a municipal corporation, is of a public nature, and subject to public regulation. (p. 947.)

**CORPORATIONS—Gas Companies—Rates.**—One of the conditions for the exercise of the privilege of conducting a gas business under legislative grant is that in the absence of legislative prescription restricting the rate of compensation for the service furnished, the grant carries by implication the obligation to furnish it at a reasonable rate and price. (p. 949.)

**CORPORATIONS—Public Service—Fixing Rates to be Charged.** The state, either directly or by delegation to some appropriate agency, has the right to prescribe the charge or rates to be made by a public service corporation for a public service, provided, under the facts and circumstances, the charge fixed is sufficient to afford a reasonable compensation. (p. 949.)

**CORPORATIONS—Public Service—Rates Charged—Reasonableness—Judicial Question.**—Whether existing or prescribed rates and charges for service by a public service corporation afford a reasonable compensation is a judicial question. (p. 949.)

**CORPORATIONS—Gas Companies—Fixing Rates.**—Although a gas company is obliged to furnish gas at a reasonable rate, no power exists in the court to prescribe, as a fixed charge for such service in future, what it may find to have been a reasonable rate for the service theretofore furnished. (p. 953.)

**CORPORATIONS—Gas Companies—Fixing Rates.**—Compelling a gas company to furnish gas to its consumers at a reasonable rate in the future must be secured, either directly or through an appropriate agency, by legislative action prescribing rates or charges which shall be reasonable for the service. (p. 953.)



Olin & Butler, for the appellants.

A. C. Hoppman, city attorney, and Bird, Gilman & Hobbins, for the respondents.

<sup>260</sup> SIEBECKER, J. The nature and the purpose of this action must be determined from the facts shown in the affidavit filed, under section 4096 of the Statutes of 1898, in the proceeding for the examination of the parties before trial. This examination is demanded for the purpose of enabling plaintiffs to frame their complaint. The affidavit states the general nature and objects of the action as well as the points upon which discovery is desired. It appears that the action is planted in equity, and is one seeking to enjoin the gas company and its officers and agents from demanding or exacting from its customers unreasonable and excessive rates for gas to be furnished to them, and to compel it to furnish a good quality and a sufficient quantity of its commodities at reasonable rates, without unjust discrimination, and to establish a uniform schedule of prices for them. There is no dispute as to the nature of the business conducted by the gas company, and there is no dispute but that it has acquired rights and privileges to conduct the business of furnishing gas and electricity to the city of Madison and its inhabitants, and that it may, for this purpose, occupy the streets and alleys of the city with pipes and poles, electric wires, and such other appliances as <sup>261</sup> are appropriate and necessary for the maintenance and conduct of its enterprise.

From the nature and object of the action and the relief demanded, it is obvious that plaintiffs are prosecuting it as one in equity to restrain the gas company from continuing to furnish these commodities to its customers at the prices it has charged and is now charging for them, upon the ground that such charges are unreasonably high and are unauthorized by the franchise it exercises, and result in an excess and abuse of the rights and privileges granted it, under which it devoted its property to a use in which the public have an interest.

The right to relief by injunction, to restrain acts in excess and abuse of corporate franchises and privileges, is recognized in the law and has been enforced by the courts of this state in appropriate cases. The presentation of the grounds of this jurisdiction contained in the opinion in Attorney Gen-

eral v. Chicago Railroad Co., 35 Wis. 425, is so complete and sufficient that nothing additional can now be said on the subject. The remedy was therein applied in an action by the attorney general, acting for the state, to restrain the railroad companies from exacting tolls for the carriage of passengers and freight in excess of the maximum rates established by acts of the legislature. It is there stated (page 524): "The equitable jurisdiction precludes the objection that there is an adequate remedy at law. It admits the remedy at law, but administers its own remedy in preference, when the state seeks it in preference. It seems to proceed on the presumption that it may better serve the public interest to restrain a corporation than to punish it by penal remedies or to forfeit its charter, and that, in that view, the proper officers of the state should have an election of remedies."

The following cases are cited in addition to those cited by the court in its opinion: Commonwealth v. Pittsburgh etc. R. Co., 24 Pa. 159, 62 Am. Dec. 372; Attorney General v. Jamaica Pond A. Corp., 133 Mass. 361; Stockton v. Cent. R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; 5 Pomeroy's 262 Equity Jurisprudence (Eq. Rem.), sec. 302, and cases cited in notes. The court also asserts that "the custom of courts of equity to interfere in such cases, at the suit of private parties for private injuries, is quite old," and that "it seems to have grown up out of the ancient jurisdiction to restrain waste and nuisance," and declares that the jurisdiction in favor of both the public and private persons is well established, "one on behalf of the state, for public wrong, and the other on behalf of private persons, for private wrong, arising from an excess or abuse of corporate franchises": 35 Wis. 528, 529. The equitable jurisdiction "of private suits to restrain private wrongs arising from" such excess or abuse of corporate powers, which was then recognized as firmly established by both the English and American cases, has been so extensively applied that it cannot now be regarded as open to question.

Among specific applications of the jurisdiction to cases pertaining to acts of corporations engaged in the business of furnishing gas and electricity to a city and its inhabitants are the following: Gas Light Co. v. Zanesville, 47 Ohio St. 35, 23 N. E. 60. This was an action by the city, in its proprietary capacity, to enforce its right to have gas furnished

by the gas company in compliance with the terms of an ordinance prescribing fixed rates. The case of *Muncie Nat. Gas Co. v. Muncie*, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822, was an action in equity by the city against the gas company to enforce obedience to an ordinance prescribing the rates and the conditions upon which gas was to be furnished to the inhabitants of the city. In *Louisville Gas Co. v. Dulaney*, 100 Ky. 405, 38 S. W. 703, 36 L. R. A. 125, equitable relief by injunction was awarded to prevent a threatened violation of franchise obligations by way of overcharges for gas. Among other cases wherein equity has exercised jurisdiction in similar cases to restrain corporations from committing acts, resulting in private injury, in excess or violation of franchise rights and obligations, are the following: *Seattle G. & E. Co. v. Citizens' L. & P. Co.*, 123 Fed. 263 588; *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 Am. St. Rep. 433, 31 N. E. 59, 16 L. R. A. 443; *Hudson River Tel. Co. v. Water-vliet T. & R. Co.*, 135 N. Y. 393, 31 Am. St. Rep. 838, 32 N. E. 148, 17 L. R. A. 674; *Pennsylvania R. Co.'s Appeal*, 115 Pa. 514, 5 Atl. 872; *Shamokin v. Shamokin etc. R. Co.*, 196 Pa. 166, 46 Atl. 382; *Ernst v. New Orleans W. R. Co.*, 19 La. Ann. 550, 2 South. 415; 5 *Pomeroy's Equity Jurisprudence* (Eq. Rem.), secs. 301-304; *Coast Co. v. Spring Lake*, 58 N. J. Eq. 586, 47 Atl. 1131, 51 L. R. A. 657, and note; *Bienville W. S. Co. v. Mobile*, 112 Ala. 260, 20 Am. St. Rep. 742, 20 South. 742, 32 L. R. A. 59; *Indianapolis Table St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539; *Sickles v. Manhattan G. Co.*, 64 How. Pr. 33. In the following cases this equitable remedy was employed by the courts of this state upon analogous grounds: *Jamestown v. C. B. & N. R. Co.*, 9 Wis. 648, 34 N. W. 728; *Oshkosh v. M. & L. W. R. Co.*, 4 Wis. 534, 17 Am. St. Rep. 175, 43 N. W. 489.

The defendants aver that it is not within the power of the court to remedy the wrongs complained of through its equitable jurisdiction, and therefore ask for the dismissal of the case. As before stated, plaintiffs seek preventive relief against acts of the gas company, alleged to constitute an excess and abuse of the privileges and franchises granted for conducting its business of furnishing gas and electricity to the city of Madison and its inhabitants. The business of supplying gas and electricity to meet the demands of the

inhabitants of a community, under grant of the state or of a municipal corporation, is of a public nature. It is, in character, a public business, and like that of common carriers, warehousemen, and other enterprises in which the community has an interest different from what it has in private enterprises devoted to manufacturing and merchandising the common articles of trade. This view was expressed by this court in the early case of *Shepard v. Milwaukee G. L. Co.*, 6 Wis. 539, 70 Am. Dec. 479, which is well supported by the decisions of various courts: *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553, 32 L. ed. 979; *New Orleans Gas Co. v. Louisiana L. Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252, 29 L. ed. 516. In *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 6 Sup. Ct. Rep. 265, 29 L. ed. 1510: "Such a business is not like that of an ordinary corporation engaged in the manufacture of articles that may be quite as indispensable to some persons as are gas lights. The former articles may be supplied by individual efforts, and with their supply the government has no such concern that it can grant an exclusive right to engage in their manufacture and sale. But as the distribution of gas in thickly populated districts is, for the reasons stated in the other case, a matter of which the public and private use constitute, in our opinion, such public services as, under the constitution of Kentucky, authorized the legislature to grant to the defendant the exclusive privilege in question": *St. Louis v. St. Louis G. Co.*, 70 Mo. 69; *Chicago G. & C. Co. v. People's G. & C. Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169; 20 Cyc., "Gas," 1154 et seq.

The right to regulate these enterprises and the property employed in them rests upon grounds which are exhaustively examined and fully elaborated in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, and the views therein expressed have been accepted by the courts of this country whenever they have been called upon to pass on the question. It is there stated that, when we look to the common law for the right of the state to regulate these public undertakings, it is found "that when private property is affected with a public interest, it ceases to be *juris privati* only." "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which

the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, as long as he maintains the use, he must submit to the control": *Attorney General v. Chicago Railroad Co.*, 35 Wis. 425.

<sup>265</sup> The right to conduct such a business under grant from a municipality in no way affects its character, and such a grant is deemed to be one from the state through one of its municipal agencies: *New Orleans v. Clark*, 95 U. S. 644, 24 L. ed. 521, and cases cited; *Hamilton G. & C. Co. v. Hamilton*, 146 U. S. 258, 13 Sup. Ct. Rep. 90, 36 L. ed. 963; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921.

One of the conditions for the exercise of the privilege of conducting a gas business, under legislative grant, is that, in the absence of legislative prescription restricting the rate of compensation for the service furnished, the grant carries by implication the obligation to furnish it at a reasonable price. Such obligation is implied by law and is incurred by acceptance of the franchise and privilege. This is the declared rule of law as established by the adjudications. See the following cases in support of the rule: *Attorney General v. Chicago etc. Co.*, 35 Wis. 425; *Shepard v. Milwaukee G. L. Co.*, 6 Wis. 539, 70 Am. Dec. 479; *Capital City G. Co. v. Des Moines*, 12 Fed. 829; *Spring Valley W. W. v. Schottler*, 110 U. S. 447, 4 Sup. Ct. Rep. 48, 28 L. ed. 173; *Dow v. Beidelman*, 25 U. S. 680, 8 Sup. Ct. Rep. 1028, 31 L. ed. 841; *Chicago etc. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. Rep. 102, 33 L. ed. 970; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 42 L. ed. 819; *Cotting v. Kansas City S. Y. Co.*, 183 U. S. 79, 22 Sup. Ct. Rep. 30, 46 L. ed. 92; *Lumard v. Stearns*, 4 Cush. 60; *People v. Budd*, 117 N. Y. 1, 5 Am. St. Rep. 460, 22 N. E. 670, 682, 5 L. R. A. 559; *Clark v. State*, 142 N. Y. 101, 36 N. E. 817. Within this principle, so established, rests the right of the state to prescribe the charge to be made for a public service, if, under the facts and circumstances, it be a sum sufficient to afford reasonable compensation.

This power of the state is in its nature legislative, and has always been exercised either directly by the legislative branch of the government or by delegation of it to municipal

corporations or some other appropriate agency. Whether existing or prescribed rates and charges for a public service afford a reasonable compensation is a judicial question. In the very nature of the right to regulate these matters between the public <sup>266</sup> and those engaged in performing the service, it must follow that courts cannot prescribe a schedule of rates and charges as the prescribed quantum of compensation which is to be awarded for future services, because it is the legislative prerogative to make and prescribe the rules which shall regulate the relations between persons and their acts as they arise in the affairs of life. When, however, such rules have been enacted as law, then the judiciary is vested with the authority to construe and apply them to the affairs they were intended to regulate and control. These two functions are recognized as distinct and separate in the fundamental organization of our government, and the prerogatives and powers of the one department of government are not to be encroached upon or curtailed by the other. In *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 14 Sup. Ct. Rep. 1047, 38 L. ed. 1014, the court, in speaking of the power to fix the compensation for a public service, says: "The courts are not authorized to revise or change the body of rates imposed by a legislature or a corporation. They do not determine whether one rate is preferable to another, or what under all the circumstances would be fair and reasonable as between the carrier and the shipper. They do not engage in any mere administrative work. But still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation."

In the *Express Cases*, 117 U. S. 1, 6 Sup. Ct. Rep. 542 628, 29 L. ed. 791, wherein the trial court had fixed and regulated the terms and prescribed what it deemed reasonable charges upon which the railroad and express companies should do their public business, it was held: "In this way, as it seems to us, 'the court has made an arrangement for the business intercourse of these companies such as, in its opinion, they ought to have made for themselves.' The regulation of matters of this kind is legislative in its character, not judicial."

<sup>267</sup> And in *Atchison etc. R. Co. v. Denver etc. R. Co.*, 110 U. S. 667, 4 Sup. Ct. Rep. 185, 28 L. ed. 291, it is observed: "A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation."

These and other cases serve to define the limits of the judicial power in dealing with the subject of enforcing the obligation as to reasonable compensation for the performance of a public service like those involved in this action. The decisions upon the subject make it obvious that the power to prescribe what the charges shall be for services rendered in the conduct of a business impressed with a public interest is vested in the legislature, and must be exercised by it directly or through some appropriate agency: *Winchester & L. T. R. Co. v. Croxton*, 98 Ky. 739, 34 S. W. 518, 33 L. R. A. 177, and cases cited in editor's note; *Huggles v. People*, 91 Ill. 256; *Sternberg v. State*, 36 Neb. 307, 54 N. W. 553, 19 L. R. A. 570; *Olmsted v. Proprietors*, 47 N. J. L. 311; *Cincinnati etc. R. Co. v. Bowling Green*, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 42 L. ed. 819; *Nebraska Tel. Co. v. State*, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; *Western Union Tel. Co. v. Myatt*, 98 Fed. 335; *Southern Pacific Co. v. Colorado F. & I. Co.*, 101 Fed. 779, 42 C. C. A. 12. The validity of such legislation may become a question of judicial inquiry if it fails to provide reasonable compensation for the use of the property devoted to such public purpose. If rates are prescribed which are too low to compensate for the service rendered, an enforcement of them would result in taking property employed in the business for a public use without just compensation. The propriety of such legislation must be judicially determined under the constitutional guaranties that "the property of no person shall be taken for public use without just compensation" and that no one shall be deprived of his property without due process of law: *Stone v. Farmers' L. & T. Co.*, 116 <sup>268</sup> U. S. 307, 6 Sup. Ct. Rep. 334, 388, 1191, 29 L. ed. 634; *Chicago etc. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. Rep. 702, 33 L. ed. 970, and other cases cited therein.

But it is insisted by respondents that, since the gas company is obligated to furnish gas to the city and its inhabitants at a reasonable price, the court has jurisdiction to determine what, under the existing facts and circumstances, is a reasonable charge, and to enforce it as the measure of future service under like conditions. No doubt the court can ascertain, within its judicial function and whenever the question is necessarily involved in any controversy to which the gas company is a party, what is a reasonable charge for gas furnished. This, however, as already shown, is the extent to which the court can go. Whatever might be determined to be a reasonable charge, under the facts and circumstances adduced in such an inquiry, cannot be enforced as a fixed charge for the service for any purpose other than to determine the particular controversy between the parties and their privies. If it were attempted to enforce it as a prescribed future charge, it would, in an indirect way, usurp the legislative prerogative of prescribing by rule the compensation for a future public service. This, as we have seen, the courts cannot do.

This question arose directly in the case of *Interstate Commerce Com. v. Cincinnati etc. R. Co.*, 167 U. S. 479, 17 Sup. Ct. Rep. 896, 42 L. ed. 243, wherein the commission had determined what were reasonable rates for transportation charges upon railroads between certain fixed points and had applied to the court for their future enforcement. It is there observed: "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act"; and the court cites cases in support of the doctrine, and concludes (167 U. S. 511, 17 Sup. Ct. Rep. 905) that, since Congress had not conferred the legislative power of prescribing <sup>269</sup> rates on the commission, "it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, . . . and then enable it to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just."

These principles are applicable to the case before us, and must be held to rule it. Nothing has been done by the state either directly or indirectly through the city of Madison



one of its agencies, to prescribe a rate at which the gas company is to furnish gas to the city and its inhabitants. True, the gas company is obligated to furnish the commodity at a reasonable rate, but no power exists in the court to prescribe as a fixed charge for such service in the future what it may find to have been a reasonable rate for the service theretofore furnished. The relief demanded, compelling the gas company to furnish gas to its customers at a reasonable rate in the future, must be secured, either directly or through an appropriate agency, by legislative action, prescribing rates or charges which shall be reasonable for the service. We discover no other object in this action, nor do the facts presented, upon which equitable relief is sought, afford any basis for any other equitable relief to remedy the wrongs complained of. Upon these considerations it must follow that the court erred in denying defendants' motion for dismissal of the action.

By the COURT. The order appealed from is reversed; and the cause remanded, with directions that the court enter an order dismissing the action and granting costs to the defendants.

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*A Court of Equity will Restrain Corporations from abusing their powers to the injury of individuals: Mayor etc. of Frederick v. Groshon, 30 Md. 436, 96 Am. Dec. 591. See, too, Buck Mountain Coal Co. v. Lehigh Coal etc. Co., 50 Pa. 91, 88 Am. Dec. 534. A carrier can be compelled by a mandatory injunction to perform its duty to furnish a shipper cars: Louisville R. R. Co. v. Pittsburg etc. Coal Co., 111 Ky. 960, 98 Am. St. Rep. 447; and it may be enjoined from charging transportation rates in excess of those fixed by law: American Coal Co. v. Consolidated Coal Co., 46 Md. 15; Attorney General v. Chicago etc. Ry. Co., 35 Wis. 425.*

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### WEGGE v. MADLER.

[129 Wis. 412, 109 N. W. 223.]

**BOUNDARIES—Streets—Construction of Deed.**—A grantee of a lot in a recorded plat takes title to the center of an adjoining street, subject to the public easement, even when the land is described by metes and bounds extending to the line of the street without express reference thereto, and even when the lot is described as bounded by the street. (p. 956.)

**BOUNDARIES—Streets—"Corner of Lots."**—In a deed of a lot in a recorded plat described by metes and bounds, the words "the

northwest corner of" the lot mean the intersection of the south and east lines respectively of the two streets at the corner of the lot and not the point at the intersection of the center lines of such streets. (p. 958.)

**EJECTMENT—Costs.**—If a sole heir of the common grantor of the parties is brought into an ejectment suit as a party, and successfully defends by separate attorney, he is entitled to recover full costs and disbursements. (p. 958.)

J. C. Kleist, for the appellant.

J. E. Burke, for the respondent.

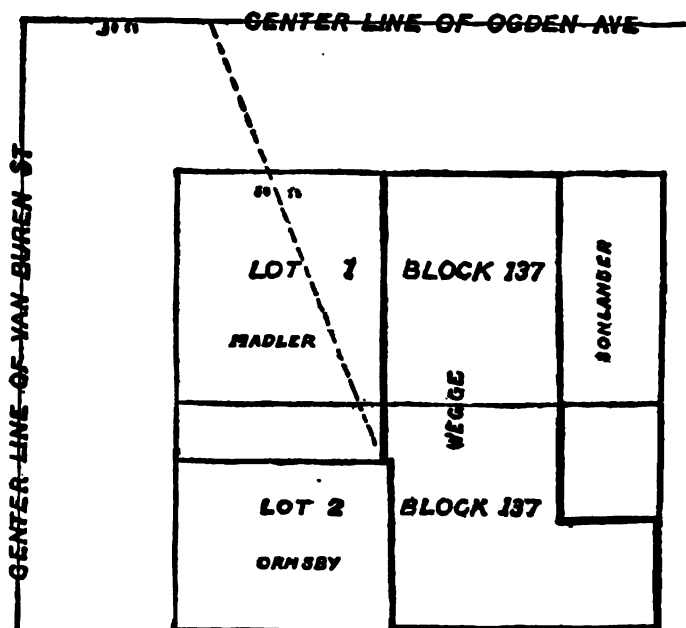
**413 CASSODAY, C. J.** This is an action of ejectment. The facts are undisputed or found by the court, and are to the following effect: Ogden avenue runs east and west and is eighty feet wide. Van Buren street is eighty feet wide, and crosses that avenue at right angles. The north side of lot 1, in block 137, abuts upon the south side of Ogden avenue, and the west end of that lot also abuts upon the east side of Van Buren street. Adjoining that lot on the south side thereof is lot No. 2 in the same block, and that lot also abuts upon Van Buren street on the west end thereof. Said lots were each a little over one hundred and twenty-seven feet long east and west, and a little over sixty feet wide north and south. At the times mentioned Julius G. C. Kasten owned the portions of the two lots here in question. On March 21, 1902, the said Kasten agreed in writing with one John C. Kleist, acting for the plaintiff, to convey to him the parts of said lots described as commencing at a point fifty feet east of the northwest corner of said lot 1; thence east on the north line of said lot 1 to a point twenty-seven and one-half feet west of the northeast corner of said lot 1; thence south ninety feet; thence east to the east line of said lot 2; thence south to the southeast corner of said lot 2; thence west on the south line of said lot 2 to the east line of Ormsby's land; thence north forty-five feet; thence west six feet; and thence north to the place of beginning. The strip of land twenty-seven and one-half feet wide off the east end of said lots was during the times herein mentioned the property of one Sonlander. In pursuance of that agreement the said Kasten on April 19, 1902, conveyed the same land therein described to the plaintiff. On May 12, 1902, said Kasten conveyed to the defendant Madler the parts of said lots described as commencing at the northwest corner of lot No. 1;

running thence south seventy-five feet along the west line of said lots 1 and 2; thence fifty feet east, parallel to the north line of said lot 2, to a point which is seventy-five feet south of the north line of lot numbered 1; thence north, parallel to <sup>414</sup> the west line of said lots 1 and 2, seventy-five feet, to a point in the north line of lot No. 1; thence west, along the north line of said lot 1, fifty feet to the place of beginning.

This action was commenced against Madler alone May 22, 1902, and to the complaint therein Madler, by Carroll & Carroll, his attorneys therein, answered. Thereupon and on June 7, 1902, the complaint was amended by making the said Julius G. C. Kasten a party defendant. To such amended complaint therein the said Kasten by his attorney, Otto R. Hansen, made answer. August 13, 1902, the said Kasten died intestate, leaving him surviving the defendant Alma Scheffer as his sole heir at law. Thereupon and in January, 1903, a separate action of ejectment was commenced by this same plaintiff against the said Alma Scheffer and Alfred Scheffer, her husband, and they by their attorney, John F. Burke, made answer to the complaint therein. April 18, 1903, the two actions were duly consolidated.

Upon the trial of the two actions thus consolidated, a jury was waived, and at the close of the trial the court found in effect the facts stated, and upon such facts and the admitted facts reached the conclusion in effect that the title to the premises described in the deed to Madler was in him and superior to any claim or title thereto in the plaintiff, and that the plaintiff was forever barred from having or claiming any title under her said deed from said Kasten to the land so owned by the said Madler adverse to him, and that the defendants have their costs and disbursements therein to be taxed, and ordered judgment to be entered therein accordingly. Such judgment was duly entered July 3, 1905, dismissing the complaint upon the merits, and adjudging that Madler was entitled to the possession of the premises described in his deed, and that Madler recover from the plaintiff his costs in the action taxed at one hundred and fifty dollars and fifty-five cents, and that Alma and Alfred Sheffer have and recover from the plaintiff their costs in the action taxed at fifty-six dollars and twenty-two cents, and that executions issue <sup>415</sup> to enforce such judgment. From such judgment and the whole thereof the plaintiff appeals.

1. It will be observed that the description of the land conveyed to the plaintiff commenced at a point fifty feet east of the northwest corner of lot 1, whereas the description of the land conveyed to the defendant Madler commenced at the northwest corner of lot 1. Thus, it appears that the northwest corner of the lot was to be the northwest corner of Madler's land, and that a point fifty feet east of that corner was to be the northwest corner of the plaintiff's land. The important question in the case, therefore, is as to the location of the northwest corner of that lot. The defendants <sup>416</sup> claim, and the court held, that the northwest corner of the lot was at the point of intersection of the south line of Ogden avenue and the east line of Van Buren street. The plaintiff contends that the northwest corner of that lot must be understood to mean the point of intersection of the center line of Ogden avenue and the center line of Van Buren street. In



[The heavy lines show defendants' claim as to the boundaries of the land conveyed by Kasten to the plaintiff. The dotted line indicates plaintiff's claim as to the last course in the description in his deed.]

support of such contention counsel invoke the well-established rule that the grantee of a lot in a recorded plat takes title to the center of an adjoining street, subject to the public easement: *Ford v. Chicago etc. R. Co.*, 14 Wis. 609, 80 Am. Dec. 791; *Pettibone v. Hamilton*, 40 Wis. 402; *Norcross v. Griffiths*, 65 Wis. 599, 56 Am. Rep. 642, 27 N. W. 606; *Andrews v. Youmans*, 78 Wis. 56, <sup>417</sup> 47 N. W. 304; *Brown v. Baraboo*, 98 Wis. 273, 74 N. W. 223. And this is so even where the land is described by metes and bounds, extending to the line of the street or highway, although without express reference to such street or highway. The same is true where the lot or land described is bounded by a public street or highway: *Gove v. White*, 20 Wis. 425; *Lins v. Seefeld*, 126 Wis. 610, 105 N. W. 917, and cases there cited. But, in view of the fact that the owner of such lot or land has no right to the possession or occupancy of any portion of such public street or highway adjoining the same, it is not customary to mention such street or highway in making a conveyance of such lot or land. It was held by this court many years ago that the land within the recorded plat of any city or village, "owned and occupied" by the debtor as a homestead, was a quarter of an acre, exclusive of the public street upon which it abutted: *Weisbrod v. Daenicke*, 36 Wis. 73. This was put on the ground that "such occupation and use" by the owner of the homestead was "inconsistent with the public easement" in such street. The correctness of such ruling is obvious. It is claimed that the contention of the plaintiff has been directly adjudicated in other jurisdictions. The cases cited and seemingly relied upon, however, merely reiterate well-established rules of law repeatedly sanctioned by this court in cases already cited and many others which might be cited: *Cox v. Freedley*, 33 Pa. 124, 73 Am. Dec. 584; *Low v. Tibbetts*, 72 Me. 92; *Moody v. Palmer*, 50 Cal. 31; *Potter v. Boyce*, 73 App. Div. 383, 77 N. Y. Supp. 24; *Sweatman v. Bathrick*, 17 S. Dak. 138, 95 N. W. 422.

At the time of making the contract with Kleist for the benefit of the plaintiff, Kasten owned parts of lots 1 and 2, having a frontage on Ogden avenue of a few inches more than one hundred feet. In making that contract and the deed given to the plaintiff in pursuance thereof Kasten manifestly intended to convey, and did convey, to the plaintiff enough of the eastern portion of the lots then so owned by him to give

a frontage of <sup>418</sup> fifty feet on Ogden avenue. The land so conveyed adjoined the strip of land belonging to Sonlander and mentioned in the foregoing statement. And by Kasten's subsequent deed to Madler he intended to convey, and did convey, the balance of said lots so owned by him, having a frontage on Ogden avenue of about fifty feet. The claim of the plaintiff that her west line ran in a northwesterly direction so as to give her a frontage of more than seventy-six feet on Ogden avenue, leaving less than twenty-four feet frontage on that avenue to be conveyed to Madler, is, in our judgment, without foundation. As held by the supreme court of Indiana, the lot must be understood to mean the land independently of the street or avenue: *Montgomery v. Hines*, 134 Ind. 221, 33 N. E. 1100. The trial court properly held that the plaintiff had no cause of action.

2. Error is assigned because the court allowed the defendants Scheffer to tax a full bill of costs and disbursements. No objection is made to the allowance of costs and disbursements in favor of Madler. He defended as purchaser from Kasten, who was brought into the case as defendant. Kasten died, and thereupon Mrs. Scheffer, as his sole heir at law, and her husband were brought into the case as defendants. Of course, it became necessary for them to defend or allow judgment to go against them by default. They appeared by a separate attorney; and, being successful, we perceive no reason why they were not entitled to legitimate costs. Of course, the items of costs were not to be unnecessarily duplicated. Accordingly, the trial court disallowed to the Scheffers all items that were common to both issues. We perceive no error in such ruling.

By the COURT. The judgment of the circuit court is affirmed.

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*Prima Facie, Proprietors Adjacent to a Highway own the fee to the middle of the road; and a grant of lands bounded by a highway is presumed to carry with it the fee to the center of the way, for, ordinarily, there is no object or purpose to be subserved by the owner retaining the title to the highway when he has parted with the ownership of the adjoining land: See the note to Wright v. Austin, 101 Am. St. Rep. 104; Friedman v. Snare & Triest Co., 71 N. J. L. 605, 108 Am. St. Rep. 764.*

WANDT v. HEARST'S "CHICAGO AMERICAN."

[129 Wis. 419, 109 N. W. 70.]

**LIBEL.**—Written or Printed Publications, Caricatures, Pictures or Effigies which falsely tend to bring a person into public disgrace, contempt or ridicule are libelous. (p. 959.)

**LIBEL.**—"Suicide Fiend."—A newspaper article falsely stating that a certain person is a suicide fiend, has attempted suicide twenty-five times, and would usually go to the hospital and ask to be pumped out, is libelous as tending to bring such person into public ridicule and contempt. (pp. 959, 960.)

**LIBEL.**—"Suicide Fiend"—Picture Published with Article.—If a newspaper article, accusing a certain person with being a "suicide fiend," is accompanied by a picture in such a way as to be in effect a statement that it is a picture of the person referred to, both together constitute a libel, although the published article gives as the name of the person referred to a name other than that of the person whose picture is published, and although the latter may not have been damaged in the estimation of friends. (p. 960.)

R. N. McMynn and Darrow, Masters & Wilson, for the appellant.

Fiebing & Killilea and O. G. Hackbarth, for the respondent.

<sup>420</sup> WINSLOW, J. It is elementary that written or printed publications which falsely tend to bring the plaintiff into <sup>421</sup> public disgrace, contempt or ridicule are libelous: *Bradley v. Cramer*, 59 Wis. 309, 48 Am. Rep. 511, 18 N. W. 368. It is also elementary that a libel need not be in printed language, but that a caricature or picture or effigy, with or without printed language, which is understood to refer to the plaintiff, and which has the tendency to bring disgrace, contempt or ridicule upon the plaintiff, is libelous: *Newell on Slander and Libel*, 2d ed., c. 4, sec. 1, p. 43.

A printed statement to the effect that a person is a suicide fiend, has attempted suicide twenty-five times, and would usually go to the hospital and ask to be pumped out, certainly as a tendency to bring that person into public contempt and ridicule. Had the article in question given no name, but simply stated that the person whose picture was given had one these things, there would be little doubt in the mind of anyone that it would have been libelous, provided the picture was accurate enough to be recognized as the plaintiff's picture. From the allegations of the complaint it must be

assumed that the picture was fairly accurate, as it is called a photograph, doubtless meaning a halftone reproduction of a photograph, which can now be made with a considerable degree of accuracy.

The insertion of the picture under the headline of the article is, of course, in effect a statement that it is a picture of the person referred to in the article. Hence, the article and picture together constitute a libel as matter of law, unless the fact that the article states that the suicide's name was Evelyn Daly can be held to be an antidote to the otherwise libelous effect. This contention is strongly made by the appellant, and is in fact the only contention worthy of very serious consideration.

It seems quite true, as urged by the appellant, that persons who knew the plaintiff well, and knew her residence and family, would probably not be misled, but would at once conclude that the picture was inserted by mistake; but there may <sup>422</sup> well be a considerable number of persons, who only know the plaintiff by sight or have merely a slight acquaintance, who would recognize the picture at once, and would conclude that the article in fact did refer to the plaintiff, concluding (if they knew the plaintiff's name at all) that such name was merely another alias. The complaint alleges that the plaintiff has been greatly damaged by the publication. There is ample room for the inference that she may well have been damaged in the estimation of the classes of people last mentioned. The fact that she may not have been damaged in the estimation of friends who knew her well would only affect the extent of injury and mitigate the damages. A very similar case where a like result was reached will be found in *De Sando v. New York Herald Co.*, 88 App. Div. 492, 85 N. Y. Supp. 111.

By the COURT. Order affirmed.

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*Newspaper Libel* is discussed generally in the note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333. As to what words are libelous per se, see the note to *Nichols v. Daily Reporter Co.*, ante, p. 796; and as to what libelous statements are privileged, see the note to *Holmes v. Clisby*, 104 Am. St. Rep. 110.



## SHUMAN v. STEINEL.

[129 Wis. 422, 109 N. W. 74.]

**HUSBAND AND WIFE—Necessaries.**—A set of "Stoddard's Lectures" is not a necessary which a wife may purchase on the credit of her husband so as to render him liable. (p. 963.)

**HUSBAND AND WIFE—Contracts by Wife on Her Credit.**—If a wife contracts an indebtedness on her own credit, the mere promise of her husband to pay it is of no greater dignity than any other promise without consideration to answer for the debt of another. Such act of the wife is not capable of ratification. (p. 964.)

**HUSBAND AND WIFE—Purchases by Wife—Ratification by Husband.**—If a wife, assuming to act as the agent of her husband, orders goods, not necessities, and receives them, and he subsequently, with knowledge of the facts, adopts her act as his own by promising to pay for the goods, or by accepting the benefit of the transaction, or in any other way, he thereby becomes liable for the indebtedness. (p. 965.)

**HUSBAND AND WIFE—Purchase by Wife—Ratification by Husband.**—If a wife, assuming to act as the agent of her husband, signs his name to an agreement to purchase goods, and he afterward adopts her act, the contract becomes, in legal effect, his from the beginning, and is enforceable as such. (p. 966.)

**CONTRACTS—Pleading—Variance.**—Proof of a contract by ratification of an agent's act is not a variance from the theory of a complaint, seeking recovery as on a direct contract. (p. 966.)

**HUSBAND AND WIFE—Contract of Purchase by Wife—Ratification by Husband.**—Evidence that a husband has stated that if his wife has entered into a contract to purchase goods not necessities, he will pay for them at a certain rate per month, which condition is assented to by the vendor, is sufficient to take the question of the husband's ratification of such contract to the jury. (p. 966.)

E. J. Jockey and J. T. Trotman, for the appellant.

Carroll & Carroll, for the respondent.

**423 MARSHALL, J.** Action to recover on alleged contract liability. The complaint was to the effect that October 15, 1902, defendant contracted in writing to take of the plaintiff a set of "Stoddard's Lectures" and pay therefor thirty-six dollars; that plaintiff fully performed his part under such contract but that defendant refused to pay for the property.

Defendant answered, denying that he agreed to purchase or that he received the property mentioned. The signature to the contract was duly put in issue so as to cast on plaintiff

the burden of proof as to whether it was that of the defendant. The evidence was undisputed that the paper was made by defendant's wife, she using his or her own name. There was some testimony tending to show that she signed her own name to the paper and that it was subsequently changed by an erasure of the letter "s" from "Mrs." There was no evidence that the contract was made for the benefit of the defendant or that his wife pretended to act by his authority, or as his agent, in making it, except as indicated by evidence tending to show that she signed his name. There was an indorsement on the paper by the person who acted on behalf of plaintiff, as follows:

"Report of agent on *subscriber*.

"Name: *Mr. B. F. Steinel*.

"Age: Twenty-seven years.

"Occupation: Mil. Sptg. Review Pub. Co.

424 "Married.

"Reputation for paying debts: Good.

"Other information:

"The subscriber is reliable and trustworthy, and I hereby certify that this agreement contains all the conditions made between me and the subscriber, and that his signature is genuine.

"J. L. DAY, JR., Solicitor."

The evidence further tended to show that defendant's wife received the books; that some time thereafter when his attention was called to the matter he said that if she ordered them he would pay for them, and that subsequently he declined to do so and offered to return the property.

After the testimony was closed defendant's counsel asked leave to introduce further evidence as to the signature having been changed, and asked to have the question submitted to the jury as to whether the credit was given to the wife and the contract signed in her name. The court ruled that the property purchased was not of the class called necessities; that it made no difference how the contract was signed or whether there was any contract at all; that the paper did not cut any figure, except that it fixed the price of the property, and that if defendant's wife ordered the goods and received them and he subsequently promised to pay therefor he was liable. Accordingly, a question covering those matters only was submitted to the jury, and was answered in the affirmative.

tive. Both sides then moved for judgment upon the verdict and the minutes of the court and the evidence. Plaintiff's motion was granted and the defendant's denied.

The assignments of error urged by appellant may be stated thus: 1. The court should have granted a nonsuit on appellant's motion because the complaint was on <sup>425</sup> contract charging him with being the maker thereof, while the proof showed that the contract was made by his wife and that he did not subsequently ratify the same; 2. The contract was that of appellant's wife, and so he was not liable without an express promise to pay, based on a new and independent consideration; 3. The contract was shown to be void because altered fraudulently in a material part; 4. The court refused to submit to the jury the question of whether appellant's wife signed the contract and the credit was given to her; 5. There was no proof that appellant promised to pay for the property. These various propositions we will not discuss in detail, but treat the case in a somewhat general way.

We can make little or no headway in determining whether the facts found by the jury are sufficient to render appellant liable by reviewing such authorities as *Day v. Burnham*, 36 Vt. 37, *Conrad v. Abbott*, 132 Mass. 330, and *Allen v. Aldrich*, 29 N. H. 63, cited to our attention by counsel for respondent. They are all cases where the wife purchased necessities on her husband's credit. Here it was properly held that the property purchased was not necessities, and the question of whether the purchase was made on the credit of the husband or on the credit of the wife was held by the learned court to be immaterial. The subject dealt with in *Conrad v. Abbott*, 132 Mass. 330, is well indicated in the following language of the syllabus: "A promise by a husband to pay for necessities which have been furnished to his wife upon his credit, if they are such as he is bound to supply her with, . . . amounts to a ratification of her contract, upon which an action may be maintained, even if she had no previous authority to purchase them."

The decision went upon the ground, which all such do, that the wife in making the purchase was presumed to assume authority to act for her husband. The court said: "The act of one assuming to be an agent, but done without authority, may be ratified, and in such case the liability of the principal arises upon the ratification."

<sup>426</sup> Cases cited by respondent to support the contention that the mere promise of the husband to pay for goods, not necessities, purchased by the wife on her own credit makes him liable do not so hold. They all proceed upon the theory of ratification of the act of the wife assuming to act for her husband. Of course, in case of necessities the element of assumed agency is much more readily proved than in case of other property. When a wife contracts an indebtedness on her own credit, then the mere promise of the husband to pay it is of no greater dignity than any promise without consideration to answer for the debt of another. That is elementary. It must be assumed that the trial court so understood the law and held appellant liable under the doctrine of ratification, upon the theory that it applied to the circumstances of the case, though they only included the elements of ordering the goods by the wife, receiving the same by her, and promise by appellant to pay therefor; that the elements of whether she assumed to act as agent in the matter or ordered the goods on her own credit were immaterial.

As to the importance of the omitted elements, in *Mechem on Agency*, at section 127, the rule is stated thus: "The act ratified must also have been done by the assumed agent as agent and in behalf of the principal. If the act was done by him as principal and on his own account, it cannot thus be ratified."

The judicial authorities are in harmony therewith. In *Meiners v. Munson*, 53 Ind. 138, cited by appellant, we have a good example. There the court said: "The rule of law is, that a ratification can only be effectual between the parties, when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent himself, or of some third person."

And further, citing from *Chitty on Contracts*, eleventh American edition, 293: "But where the party making the contract had no authority to contract for the third person and did not profess, at <sup>427</sup> the time, to act for him, it seems that the subsequent assent of such third party, to be bound as principal, has no operation."

And further, citing from 1 *Parsons on Contracts*, sixth edition, 346, where the author was speaking of a situation similar to that before us, "We may add that such a case would perhaps fall within the rule that no act is capable of

ratification by the principal which was not performed by the agent as agent, and in behalf of the principal." To the same effect are *Saltmarsh v. Candia*, 51 N. H. 71; *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 42 N. W. 467, 4 L. R. A. 196; *Mitchell v. Minnesota F. Assn.*, 48 Minn. 278, 51 N. W. 608; *Schreyer v. Turner F. Co.*, 29 Or. 1, 43 Pac. 719; *Minnich v. Darling*, 8 Ind. App. 539, 36 N. E. 173.

The argument advanced that appellant could not become liable in the absence of an express promise, based on a new and independent consideration, in any event, is answered by the rule that the liability of one who ratifies as principal the unauthorized act of another, who assumed to contract in his behalf, goes upon the ground of adoption of the unauthorized act, and therefore requires no consideration. So, if appellant's wife, assuming to act as his agent, ordered the books from respondent and received them, and he subsequently, with knowledge of the facts, adopted her act as his own by promising to pay for the property, or by accepting the benefit of the transaction, or in any other way, he thereby became liable for the indebtedness.

From the foregoing it seems plain that the question of whether appellant's wife signed his name to the contract, and the one as to whether she assumed to act for him, were material on the question of his liability. There was some evidence that she signed her own name to the paper, and we must assume that other evidence on that line, which appellant asked leave to present after both sides had rested, would have been offered and received had the court not held that, if she <sup>128</sup> signed her own name and the credit was given to her, the promise by her husband to pay the debt made it his obligation; since the rejection of the offer of additional evidence was placed on the ground of immateriality.

What has been said seems to govern all the questions raised which need attention. The motion for a nonsuit upon the ground that the signature of the appellant was put in issue and no proof was produced to show that he did sign the paper, but, on the contrary, the evidence was to the effect that his wife signed her own name thereto, and that subsequently the signature was fraudulently changed, was properly overruled because, as to whether the signature was changed, the evidence was in conflict, and as to whether the signature should be regarded as appellant's turned on the question of ratifi-

cation. If the wife signed appellant's name, assuming to act as his agent, and he afterward adopted her act, the contract became, in legal effect, his from the beginning, and was enforceable as such. It follows that the claim that a recovery based on ratification was a departure from the one set forth in the complaint cannot be approved.

The claim that, assuming for the purposes of the case the circumstances were such that a promise on the part of appellant to pay for the books would have ratified the act of the wife as his, there was no proof of such promise, the court properly ruled in respondent's favor. The testimony was to the effect that appellant's statement, that if his wife ordered the goods he would pay for them at the rate of about ten dollars a month, was assented to, as the jury were warranted in concluding. The person who represented plaintiff testified that he said to appellant he thought the condition of payment suggested would do, and in subsequent communications in respect to the matter there was no change as to such assent.

So the case comes down to this: The trial court erred in not submitting to the jury in some proper way whether appellant's wife assumed to act as agent for her husband or <sup>429</sup> signed her own name and the credit was given to her. If she signed her name to the paper and did not assume to act as agent for her husband, as before indicated, there could be no ratification, and, under the circumstances of the case, no liability on the part of appellant created by his mere promise to pay for the goods.

By the COURT. The judgment is reversed, and the cause remanded for a new trial.

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*The Implied Authority of a Wife to act for and bind her husband, including her authority to charge him for necessities, is discussed at length in the note to Wanamaker v. Weaver, 98 Am. St. Rep. 627.*

**KLUG v. SHERIFFS.**

[129 Wis. 468, 109 N. W. 656.]

**CONTRACT to Paint Portrait—Breach of Trust.**—If a person, after filling an order to paint a portrait from photographs furnished by his patron to aid him in his work, and after being paid therefor, proceeds, without authority, to paint another portrait from the same photographs, which he places in the possession of his patron for his inspection, and which is retained by him, the artist cannot compel his patron to pay for the last portrait. The act of painting it constitutes a violation of contract and a breach of trust. (p. 969.)

A. C. Umbreit, for the appellant.

J. W. Wegner, for the respondent.

470 **KERWIN, J.** The facts in this case are substantially undisputed, and the questions of law are: (1) Whether the painting of the second portrait was an invasion of the so-called "right of privacy"; and (2) whether the painting of the second portrait was a breach of trust, contract, or confidence, and whether the plaintiff acquired any property in the second portrait.

1. Upon the first proposition, as regards the right of privacy, the authorities seem to leave the question in some uncertainty as to the extent to which courts will go in enforcing the right. In *Atkinson v. Doherty & Co.*, 121 Mich. 372, 80 Am. St. Rep. 507, 80 N. W. 285, 46 L. R. A. 219, it was held that equity will not restrain the use of the name and likeness of a deceased person as a label for a brand of cigars named after him, though offensive to the family of the deceased, so long as it does not amount to a libel. In *Schuyler v. Curtis*, 147 N. Y. 434, 49 Am. St. Rep. 671, 42 N. E. 22, 31 L. R. A. 286, it was held that the individual right of privacy, which any person has during life, dies with the person, and any right of privacy which survives is a right pertaining to the living only. In this case the plaintiff brought an action to restrain defendants from making a statue or bust of deceased, Mrs. Schuyler, or from receiving subscriptions for the purpose of defraying the cost of making the same, and also restraining them from using the name of Mrs. Schuyler or circulating any description of her in connection with the 'Woman's Memorial Fund Association.' The action

was brought by relatives of Mrs. Schuyler, and it was held that the action could not be maintained, it appearing that the motive of the parties interested in erecting a bust was to do honor to the memory of the deceased. Again, the question was considered by the court of appeals of New York, in *Roberson v. Rochester F. B. Co.*, 171 <sup>471</sup> N. Y. 538, 89 Am. St. Rep. 828, 64 N. E. 442, 59 L. R. A. 478, Chief Justice Parker writing the opinion, in which he reaches the conclusion, substantially: "An individual's so-called right of privacy, founded upon the claim that he has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon, either in handbills, circulars, catalogues, periodicals or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise, does not exist in the law, and is not enforceable in equity. . . . An injunction cannot be granted to restrain the unauthorized publication and distribution of lithographic prints, or copies, of a photograph of a young woman as part of an advertisement of a legitimate manufactured article, where there is no allegation that the picture is libelous in any respect; but, on the contrary, the gravamen of the complaint is that the likeness is so good that it is easily recognized, and that it has been and is used to attract attention to the advertisement upon which it is placed, although the publication has caused her great mental and physical distress, necessitating the employment and attendance of a physician."

There is, however, in each of these cases a vigorous dissenting opinion by Justice Gray. In the late case of *Pavesich v. New England L. Ins. Co.*, 122 Ga. 190, 106 Am. St. Rep. 104, 50 S. E. 68, 69 L. R. A. 181, the supreme court of Georgia approves the doctrine laid down in the dissenting opinion of Justice Gray in the New York cases, and, in a very able and exhaustive opinion reviewing the cases, holds that the right of privacy is a form of property as much as the right of immunity of one's person. Most of the leading cases are collected and discussed in this case. In the opinion the court quotes approvingly the following language from the dissenting opinion of Justice Gray in *Roberson v. Rochester F. B. Co.*, 171 N. Y. 538, 89 Am. St. Rep. 828, 64 N. E. 442, 59 L.



R. A. 478: "The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to <sup>472</sup> be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone: Cooley on Torts, 29. The principal is fundamental and essential in organized society that everyone, in exercising a personal right, and in the use of his property, shall respect the rights and properties of others. He must so conduct himself, in the enjoyment of the rights and privileges which belong to him as a member of society as that he shall prejudice no one in the possession and enjoyment of those which are exclusively his. When, as here, there is an alleged invasion of some personal right or privilege, the absence of exact precedent, and the fact that early commentators upon the common law have no discussion upon the subject are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case is not a fatal objection."

It will be seen, however, upon examination of the cases cited as sustaining the so-called right of privacy, that many of them turn upon property rights or breach of trust, contract or confidence: *Levyean v. Clements*, 175 Mass. 376, 56 N. E. 735, 50 L. R. A. 397; *Morrison v. Moat*, 9 Hare, 241; *Prince Albert v. Strange*, 2 De Gex & S. 652; *Tuck & Sons v. Priester*, L. R. 19 Q. B. D. 629; *Pollard v. Photographic Co.*, L. R. 40 Ch. D. 345; *Gee v. Prichard*, 2 Swan. 402; *Woolsey v. Judd*, 4 Duer, 379. See, also, 4 *Harvard Law Review*, 193, and 3 *Northwestern Law Review*, 1; *Corliss v. E. W. Walker Co.*, 57 Fed. 434, 64 Fed. 280, 31 L. R. A. 283.

2. We think the case before us does not turn upon the so-called "right of privacy," but upon contract relations. The plaintiff seeks to recover at law for the alleged value of the picture, upon the ground that he had a property right in it, and that the defendant, by retaining it, became liable as a purchaser. The complaint is to recover for goods, wares and merchandise sold and delivered to the defendant. The plaintiff, under a contract to paint the portrait, received the two photographs for the purpose of aiding him in the paint-

ing of <sup>473</sup> the original picture, which he painted and was paid for in accordance with the contract. He then undertook, without any authority from the defendant, to paint the second portrait; and, as he says in his letter to defendant, "decided to risk having one painted, which I should be pleased to have you see, either at your home or mine, as it suits your convenience." There is no claim that plaintiff ever had authority to paint the second portrait or that defendant ever assented thereto. Under the contract plaintiff had no right to hold the photographs or use them for any other purpose than to aid him in painting the original picture. No express authority to use them for any other purpose was given, and none can be implied from the nature of the engagement. When the original picture was painted plaintiff's contract with defendant was performed, and he had no right to retain the photographs for any other purpose. When he undertook to produce another picture from the indoor photograph he violated his contract with defendant, and such act amounted to a breach of the trust reposed in him under the contract relation existing between them.

In *Levyau v. Clements*, 175 Mass. 376, 56 N. E. 735, 50 L. R. A. 397, defendant contracted with plaintiff for a certain number of cuts from defendant's dies to be used by defendant in his business. The plaintiff, in addition to the number of cuts contracted for by defendant, printed a certain number extra for his own use without the knowledge of defendant. By mistake the extra cuts or folders were delivered, with the others, to defendant, which was immediately discovered, and demand made upon defendant for them, which was refused. Defendant kept the extra cuts not ordered, and used them the same as the others. In an action of trover the lower court ruled plaintiff could recover, and the judgment was reversed upon appeal. The court said (175 Mass. 379, 56 N. E. 736): "The plaintiff had no right to use the dies to have impressions of them printed for his own use, and his use of them <sup>474</sup> in having eighty extra copies of the folder struck off for himself, for the purpose of advertising his own business of making dies, was a breach of trust toward the defendant, which would have entitled the latter to have, at least if the matter were of sufficient consequence, an injunction to restrain the plaintiff from using the folders thus wrongfully obtained, and to a decree ordering them to be destroyed."

In *Tuck & Sons v. Priester*, L. R. 19 Q. B. D. 629, the plaintiffs employed defendant, who was a printer in Berlin, to make for them copies of a drawing. Defendant made the copies ordered, and also, without the knowledge or consent of plaintiffs, made other copies and imported them to England. It was held that there was an implied contract that defendant should not make any copies of the drawing other than those ordered by plaintiffs, and that plaintiffs were entitled to an injunction and damages by reason of the defendant's breach of contract. In *Pollard v. Photographic Co.*, L. R. 40 Ch. D. 345, a photographer who had taken a negative likeness under agreement to supply the person with copies was restrained from selling or exhibiting copies, on the ground that there was an implied contract not to use the negative for such purpose; and, further, because such sale or exhibition was a breach of confidence. In *Prince Albert v. Strange*, 2 De Gex & S. 652, it was held that, where a workman intrusted with copperplates for the purpose of taking impressions for the plaintiff of etchings made by the latter, and not intended for publication, took impressions for himself, in violation of the trust, and sold the impressions to the defendant, who published a catalogue of them, accompanied by remarks of his own, the plaintiff was entitled at the hearing to a perpetual injunction to restrain the publication of the catalogue and to a decree ordering the impressions to be destroyed.

We think the doctrine of the above cases rules the case before us, and that plaintiff had no right to paint the second picture or use the photographs for such purpose. The plaintiff, being guilty of a breach of contract and of trust and confidence as well in painting the second portrait, could acquire no property in it, and therefore had none to sell to defendant or anyone else.

It follows that the plaintiff was not entitled to recover.

By the COURT. The judgment of the court below is affirmed.

Mr. Justice Dodge Dissented, and said: "No rule is more elementary than that one who knowingly accepts and avails himself of services performed by another is bound by implied promise to pay for such services although neither requested nor authorized in advance. *Wheeler v. Hall*, 41 Wis. 447; *Wellauer v. Fellows*, 48 Wis. 105, 4 N. W. 114; *Goodland v. Le Clair*, 78 Wis. 176, 47 N. W. 268; *Williams v. Williams*, 114 Wis. 79, 89 N. W. 835; *Manitowoc S. B. Co. v. Man-*

Itowoc G. Co., 120 Wis. 1, 97 N. W. 515; Indiana Mfg. Co. v. Hayes, 155 Pa. 160, 26 Atl. 6; Bartholomae v. Paull, 18 W. Va. 771; Ford v. Ward, 26 Ark. 360; Abbot v. Hermon, 7 Me. 118. Here the plaintiff painted the picture in question knowing that defendant would not thereby be placed under any liability, but would have the right after its completion to avail himself of the service or reject it. At defendant's request it was placed in his possession to enable him to decide whether he would reject or would accept it, with complete understanding that plaintiff expected payment in the latter event. Defendant has retained it. He cannot now be heard to say that he did not expect to pay for it. His acts give him full benefit of plaintiff's work and he should not, by his own testimony to a mental state of disapproval, be permitted to deny the legal effect of such acts. He could have refused or surrendered the picture, if dissatisfied, with no prejudice to any so-called rights of privacy as they existed before plaintiff, at defendant's request, put it in the latter's possession."

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*The Contract Between a Photographer and his customer includes, by implication, an agreement that the negative shall be used only for the printing of such photographic portraits as he may order or authorize, and an action lies for a breach of this implied contract: Moore v. Rugg, 44 Minn. 28, 20 Am. St. Rep. 539.*

*The Publication of One's Picture, without his consent, as an advertisement for the mere purpose of increasing the profits of the advertiser is an unlawful invasion of the right of privacy, and entitles him whose right is thus invaded to recover of the wrongdoer without proof of special damages: Pavesich v. New England Life Ins. Co., 122 Ga. 190, 106 Am. St. Rep. 104. See the note on the right of privacy to Roberson v. Rochester Folding Box Co., 89 Am. St. Rep. 844.*

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### CLAWSON v. STATE.

[129 Wis. 650, 109 N. W. 578.]

**FALSE PRETENSES—Note as Property.**—A note is within the meaning of the words "other property" contained in a statute making it a crime to obtain by false pretenses "money, goods, wares, merchandise or other property" belonging to another person. (p. 976.)

**FALSE PRETENSES—Essentials of Offense.**—Property is not obtained by false pretenses if that obtained is only such as the accused is legally entitled to receive, though it is obtained by means of a falsehood. In such case two of the essentials of the crime are lacking—that of an intent to defraud, and an actual defrauding. (p. 976, 977.)

Defendant was charged with obtaining a note by false pretenses and false representations that he had sold, for

seven thousand five hundred dollars, a boat belonging to the prosecuting witness to one H. H. Hayward, who was worth one hundred thousand dollars, both statements being false, to the knowledge of the accused. Verdict of guilty, and defendant sued out a writ of error.

M. E. Davis, for the plaintiff in error.

L. M. Sturdevant, attorney general, and A. C. Titus, for the state.

652 DODGE, J. 1. At the very threshold of this case we are confronted by a very important and doubtful question of law, affecting the general scope of this part of the criminal law of this state, on which we have received no aid from counsel on either side, and upon which the field of at least suggestive decisions is quite extended, and has involved us in much labor and research. That question is whether our statute (Stats. 1898, sec. 4423) makes criminal the obtaining by false pretenses a promissory note or other evidence of indebtedness. Our statute, adopted originally from Massachusetts, makes criminal only the obtaining of "money, goods, wares, merchandise or other property." The Massachusetts statute was substantially an adoption of the English acts of 30 George II, caption 24, and 52 George III, caption 64. Since the respective adoptions the statutes have been modified both in 653 England and Massachusetts by an addition to the list of property which might be the subject of the crime, of apt words to describe evidences of indebtedness, and in the overwhelming majority of other states the statutes defining the crime of false pretenses either nominate expressly "evidence of indebtedness," or do not, like ours, contain such a category of tangible material property as to suggest, by *oscitur a sociis*, a limitation of the final general words to similarity to such a preceding category. We have been unable to find either in England or Massachusetts a decision whether evidences of debt might be the subject of obtaining goods under false pretenses during the period that their statutes failed to cover them specifically.

Our own statute was first considered in *State v. Green*, 7 Vis. 676, wherein the charge was of obtaining a check, which, however, seems to have been cashed, so that the accused did in fact obtain the money, although that fact seems not to

have been charged in the indictment. No question was raised or considered by the court as to the sufficiency of this allegation to satisfy the clause of the statute, the indictment being held bad on other grounds. The next case was *State v. Kube*, 20 Wis. 217, 91 Am. Dec. 390, which was a charge of obtaining "a package of money containing the sum of sixty dollars in bank bills." The court held, not that bank bills were included in the expression "other property," but were described by the word "money"; for the reason that such word, in reasonable and colloquial use, signified whatever customarily passed current as a medium of exchange and commerce, and was not necessarily confined to coined metals. The next case of significance is *State v. Black*, 75 Wis. 490, 44 N. W. 635, where the ultimate decision was that the obtaining of board and lodging, or, as the court characterized it, a mere credit, was not penal under this section. But it was there said: "We are to remember that it is a criminal statute we are construing. It should not be so construed as to multiply crimes, unless required by the context. The word 'property' <sup>654</sup> is, in many cases, construed to include 'things in action and evidences of debt': Rev. Stats. 1878, sec. 492 subds. 3, 4. But the words 'other property,' in the statute quoted, must, under the familiar rule, *noscitur a sociis*, be limited to such tangible classes of property as are therein previously enumerated; that is to say, 'money, goods, merchandise, and other property' of that description."

In *Bates v. State*, 124 Wis. 612, 103 N. W. 251, the holding was that a charge of obtaining money was not satisfied by proof of obtaining drafts by one bank on another, although in course of discussion it was said that for the obtaining of such drafts the defendant could be prosecuted. That was said upon the authority of *Commonwealth v. Coe*, 115 Mass. 481, overlooking the distinction between the present statutes of that state and our own.

This seems to be the extent of decision on the subject in Wisconsin, and, as a result, we may fairly consider the question an open one here. The words quoted from *State v. Black*, 75 Wis. 490, 44 N. W. 634, are perhaps a more deliberate and authoritative expression of the view of this court as to the true construction of this statute than the remark dropped in *Bates v. State*, 12 Wis. 612, 103 N. W. 251, for in both the court was speaking *arguendo* and not directly

considering the question whether the words "other property" were intended by the legislature to include such an evidence of debt as a formal promissory note, bank draft, or a check, all of which are doubtless generally included within the word "property," when used in other statutes: Stats. 1898, sec. 4972, subds. 3, 4; *Storm v. Cotzhausen*, 38 Wis. 139; *State v. Coyle*, 41 Wis. 267; *Wayland Univ. v. Boorman*, 56 Wis. 657, 14 N. W. 819.

In other states, where the statutes do not by clear expression include bills and notes, the decisions are in favor of their inclusion under such expressions as "other property," or "other valuable thing," or "valuable effects": *State v. Tomlin*, 29 N. J. L. 13; *State v. Thatcher*, 35 N. J. L. 445; *State v. Switzer*, 63 Vt. 604, 25 Am. St. Rep. 789, 22 Atl. 724; *People v. Stone*, 9 Wend. 182; *State v. Patty*, 97 Iowa, 373, 377, 66 N. W. 727. In the *Thatcher* and *Stone* cases the court reaches this conclusion by somewhat dogmatically declaring that the intention of the legislature was obviously to include all things which might be the subject of larceny, and hence that the words "or other property" must be viewed as an intended addition to the more specific designations of property preceding them. In other words, that the rule *noscitur a sociis* should not be applied to restrain the concluding words from their full effect. In Iowa the application of the words "other property" to evidences of indebtedness is predicated on a provision of the code similar to our section 4972, to the effect that property includes personal and real property, and personal property includes evidences of debt and things in action—an argument which has generally been denied full effect, for, uniformly, "other property," in these statutes, has been held not to include real estate: *State v. Burrows*, 11 Ired. 477; *Commonwealth v. Woodrun*, 4 Clark, 207; *People v. Cummings*, 114 Cal. 437, 46 Pac. 284.

The rule *noscitur a sociis* is, of course, only a rule of construction, although among those most frequently applied and perhaps most in accord with the real fact as to attempts to express in words those things as to which it was intended to legislate. If, however, the court is convinced that a general *et cetera* expression is appended to a list of specific designations with the intent to broaden the same, it is, of course, its duty to give such words that effect. "Other property," literally, is, of course, broad enough to include a promissory note

or bill of exchange; hence, unless a court is convinced by the association of such words with others that they are used to express some more limited conception, there is ample justification for applying them to the full extent of their literal meaning. Doubtless there is cogent argument that such articles of property as those now under consideration are as ~~656~~ likely to be the objects of cupidity, are as likely to be obtainable by misrepresentation, as any other forms of personal property, and that the injury to be done the defrauded person, and perhaps others, is, if anything, more imminent than in the case of tangible 'chattels. From considerations such as these, after giving due weight to the expression hereinbefore quoted from *State v. Black*, 75 Wis. 490, 44 N. W. 635, the court has concluded that the true intention of the legislature will be best given effect by holding that a promissory note is within the meaning of the words "or other property" in section 4423—a conclusion with which, I may be permitted to say, without a formal dissenting opinion, my personal views do not accord.

2. The trial court correctly instructed the jury that the offense of obtaining property by false pretenses involved at least four essential elements: (1) There must be an intent to defraud; (2) there must be an actual fraud committed; (3) false pretenses must be used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of the false pretenses made use of for that purpose: *State v. Clark*, 46 Kan. 65, 26 Pac. 481; *State v. Palmer*, 50 Kan. 318, 32 Pac. 29; *People v. Wakely*, 62 Mich. 297, 28 N. W. 871; *Owens v. State*, 83 Wis. 496, 53 N. W. 736. In application of this rule it has been held that the first two of these elements do not exist where the property sought to be obtained, and in fact obtained, was only such as the accused had a perfect and complete legal right to receive: *Rex v. Williams*, 7 Car. & P. 354; *Commonwealth v. McDuffy*, 126 Mass. 467; *Commonwealth v. Harkins*, 128 Mass. 79; *People v. Thomas*, 3 Hill, 169; *State v. Hurst*, 11 W. Va. 54; *Commonwealth v. Thompson*, 2 Clark, 33; *Commonwealth v. Henry*, 22 Pa. 253. The special application in most of these has been to the obtaining by means of falsehood merely the payment of money to which the accused was legally entitled, it being held that thereby no fraud is worked



<sup>657</sup> upon the other party, and no intent to defraud can be inferred from such act.

Applying that principle to the present case, we have, without hesitation, reached the conclusion that the proof in the record is conclusive that at the time the defendant obtained the five hundred dollar note from Hagerty the latter owed him that amount of money; that, if defendant had sued Hagerty for five hundred dollars commission for making sale of his vessel, any court must, upon the same evidence, have rendered judgment in the former's favor. There is, of course, no dispute that Hagerty agreed to pay the defendant five hundred dollars for making sale. The evidence is overwhelming and undisputed that defendant found a customer ready, able and willing to take the property at the price fixed by the owner, at seven thousand five hundred dollars, and that Hagerty accepted such customer and the condition that he was to pay only when clear title was deposited with a specified bank. Thereafter Hagerty failed, for reasons of his own, to make out such title. He has offered some proof that he could have made it out any time had the money first been deposited. But the prior deposit of the money was not in accordance with the terms of the sale, and he refrained from perfecting title apparently by reason of his desire to acquire his partner's half interest at some less rate, either by foreclosure of a mortgage which he held thereon or by purchase. It matters not, however, what reasons controlled Hagerty. It suffices that he did, in fact, fail to perform on his part the terms of the sale effected by the defendant, to which Hagerty had agreed. True, some of these facts depend upon the testimony of the defendant, although in many respects he is confirmed by testimony of others. But there is nothing in the case to throw his testimony either in conflict with other facts or evidence or under suspicion. Evidence was offered by the defendant of his good character, standing in the community, and financial responsibility, whereby the door was opened to the prosecution to attack him in those respects. No evidence <sup>658</sup> was offered that he was other than he described himself. There is a vague suggestion in argument that the nonappearance of the proposed purchaser, Hayward, at the time of trial, and defendant's inability to produce him, justified a suspicion that he was

a myth. But it must be remembered that approximately a year had been allowed to elapse between the obtaining of the note and any complaint by Hagerty, and that during that time the hotel where Hayward made his headquarters, and where alone defendant had known him, had gone out of existence, and defendant had no starting point from which to search for the man. No reason is suggested for this delay on Hagerty's part. The note was protested against him only one month after it was given as being already transferred to a third party. The defendant was at least monthly in Green Bay, where he was well known and easy of access, either for demand of explanation, or for arrest if Hagerty believed him guilty of the crime now charged. Neither was there anything in defendant's conduct immediately following the transaction to justify suspicion. He remained at Green Bay in contact with Hagerty for nearly a week after he received the note. He at first used it only as collateral security for a small sum of money, so that it was open, in the main, to any defenses that Hagerty might have. With this uncontradicted evidence that defendant obtained nothing from the prosecutor except what he was entitled to, and which should have been given him upon demand without the representations charged as false in the information, it is clear that the evidence did not establish either that Hagerty was defrauded or that the representations were made with intent to defraud. It was error to refuse defendant's motion for the direction of verdict in his favor.

By the COURT. Judgment reversed, and cause remanded for a new trial.

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*The Crime of Obtaining Property by False Pretenses* is the subject of a note to Barton v. People, 25 Am. St. Rep. 378. A promissory note is within the meaning of a statute making it a crime to obtain the money or other property of another by means of false pretenses State v. Switzer, 63 Vt. 604, 25 Am. St. Rep. 789. The crime is not committed where the property obtained is such as the accused is entitled to: In re Cameron, 44 Kan. 64, 21 Am. St. Rep. 262.

## NORTON v. STATE.

[129 Wis. 659, 109 N. W. 531.]

**FORGERY—Check Payable to Order.**—A check falsely made with intent to defraud, and apparently sufficient on its face is a forgery, though other steps, such as indorsement, are required to be taken to perfect it in the hands of the accused. (p. 980.)

**FORGERY—Negotiable Paper Payable to Order—Indorsement.** Negotiable paper payable to the order of the payee may be transferred without his indorsement, and cannot be said not to be the subject of a forgery by another person, for the reason that it is without value in his hands. (p. 980.)

**APPEAL IN CRIMINAL CASES—Record—Review.**—If, in a criminal case, the bill of exceptions contains no exception to the charge of the court, and the motion for a new trial does not specifically point out the objectionable parts thereof, errors assigned upon such charge cannot be reviewed on appeal. (p. 981.)

The defendant was charged with forging the following instrument:

“Sheboygan, Wis., Jan. 6, 1906. No. 14.

“BANK OF SHEBOYGAN.

“Pay to John Walsh or order, \$52.75/100 Fifty-two Dollars

“ERNEST GONZENBACH.”

The defendant, on his trial, was found guilty and sentenced, and now prosecutes this writ of error.

T. M. Bowler, for the plaintiff in error.

L. M. Sturdevant, attorney general, and A. C. Titus, for the state.

660 **SIEBECKER, J.** The plaintiff in error was convicted on the charge of forging the check set out in the foregoing statement. It is averred that forgery cannot be predicated on this instrument because it had no legal efficacy in the hands of defendant. There is no question but that an instrument which is clearly void upon its face cannot be made the subject of forgery: *John v. State*, 23 Wis. 504. The check in question upon its face is in the usual form, and in the hands of the payee, if genuine, would be a binding obligation. The claim is made, however, that this check, if genuine, was not available to the plaintiff in error without the indorsement of Walsh, and that it must be held to be void and valueless in his hands, since the law could not presume

that he could collude with Walsh to obtain his indorsement or that he would commit the offense of falsely impersonating him or forging his name as an indorser. We find no force in these objections. If plaintiff in error were charged with the offense of uttering this paper the considerations suggested in support of these contentions might have a bearing, but no such offense is here charged. It is immaterial that the instrument is not available for reasons not appearing on the face of it. If it is falsely made with intent to defraud and apparently sufficient on its face it is a forgery, though other steps were required to be taken, if it were genuine, to perfect it in plaintiff in error's hands. This is upon the ground that an instrument apparently valid on its face is only voidable, if genuine, by impeaching it directly. And so here, if plaintiff in error had <sup>661</sup> passed this check, which is complete and valid on its face, its invalidity would be made to appear only by extrinsic evidence impeaching its apparent validity. Under such circumstances the instrument, if falsely made with intent to defraud, is held to be a forgery because it purports to be good: *Commonwealth v. Costello*, 120 Mass. 358; *United States v. Turner*, 7 Pet. 132, 8 L. ed. 633; *Barnum v. State*, 15 Ohio, 717, 45 Am. Dec. 601; *Harding v. State*, 54 Ind. 359; *Arnold v. Cost*, 3 Gill & J. 219, 22 Am. Dec. 302; *Hess v. State*, 5 Ohio, 5, 22 Am. Dec. 767; 19 Cyclopedia 1380. The contention that the check was without value in the hands of the plaintiff in error without the indorsement of Walsh is refuted by the decision of this court to the effect that a negotiable paper payable to the order of the payee may be transferred without his indorsement: *Esau v. Greene & B. Co.*, 94 Wis. 8, 68 N. W. 405; *Lawless v. State*, 114 Wis. 189, 89 N. W. 891.

It is urged that the evidence fails to show that, if the plaintiff in error falsely made this check, he did so with intent to defraud. There is evidence in the case tending to show that plaintiff in error signed the name of Ernest Gozenbach without authority; that he, in conversation with a clothing merchant, mentioned the fact of his having a check and made suggestions as to having it cashed; and that a check, with the one which he is charged with having forged, was found in his possession on the day of his arrest. He could give no satisfactory explanation as to how he had obtained them. Coupled with his admission to the officer who

arrested, referring to an alleged former forgery, that he had "been at it again," this evidence furnished sufficient basis for submitting the question of the fraudulent intent to the jury. We find that the court fully apprised the jury that, in order to justify a conviction, the intent of the plaintiff in error to defraud must be found to have existed when he made the check. We are of the opinion that this question of intent to defraud was properly submitted to the jury, and, under the circumstances, their finding is warranted and binding.

<sup>962</sup> We are of the same opinion as to the sufficiency of the evidence that the offense was committed in Sheboygan county.

Some errors are assigned upon the charge of the court to the jury. The bill of exceptions contains no exception to any portion of the charge, nor does the motion for a new trial specifically point out, as a ground for a new trial, the objectionable portions of the charge. This state of the record does not present these questions for review by this court: *Nisbet v. Gill*, 38 Wis. 657; *Dean v. Chicago etc. R. Co.*, 43 Wis. 305; *Wells v. Perkins*, 43 Wis. 160; *Grabowski v. State*, 126 Wis. 447, 105 N. W. 805.

By the COURT. Judgment affirmed.

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*On What Constitutes Forgery*, see the notes to *Arnold v. Cost*, 22 Am. Dec. 306; *Hendricks v. State*, 8 Am. St. Rep. 466. An instrument, to be the subject of forgery, must, on its face, be valid for the purpose for which it is created. An instrument void on its face cannot be the subject of forgery: *Burden v. State*, 120 Ala. 388, 74 Am. St. Rep. 37; *King v. State*, 42 Tex. Cr. Rep. 108, 96 Am. St. Rep. 32, and see the cases cited in the cross-reference note thereto. But writing may be the subject of forgery although not addressed to anyone: *Allen v. State*, 44 Tex. Cr. Rep. 63, 100 Am. St. Rep. 839.

# CASES

## IN THE

# SUPREME COURT

### OF

## WYOMING.

### STATE v. GRANT.

[14 Wyo. 41, 81 Pac. 795, 82 Pac. 2.]

**MANDAMUS—Removal from Office—Payment of Salary.**—Mandamus will lie to compel the payment of his salary to a public officer who is alleged to have been removed from office, though as incidental to the determination of that matter it may be necessary to decide upon the legality of his removal. The application will be entertained merely to the extent of determining whether the relator is entitled to the relief prayed for, and not for the purpose of trying the title to the office as between the contesting claimants. (p. 985.)

**OFFICE AND OFFICERS—Removal from Office.**—A state superintendent of a water division who is appointed by the governor with the consent of the senate is not exempt from removal from office except by impeachment, but is subject to a constitutional provision that all officers not liable to impeachment shall be subject to removal from office for misconduct or malfeasance therein in such manner as may be provided by law. (p. 987.)

**OFFICE AND OFFICERS—Property Right in Office.**—A public office is not to be regarded as the property of the incumbent, nor has he any property right therein. (p. 989.)

**OFFICE AND OFFICERS—Removal from Office—Right to Notice and Hearing.**—If statutory power has been conferred upon the governor to remove an appointive officer having a definite term, and the statute does not provide the procedure, it will not be presumed that such removal may be made without notice and a hearing, but if the authority is expressly given to proceed summarily, no such notice is necessary. (p. 990.)

**OFFICE AND OFFICERS—Removal from Office—Right to Notice and Hearing.**—If statutory power is conferred upon the governor to remove an appointive officer, in language which is plain, and upon filing his reasons therefor in writing with the Secretary of State, thus declaring the express conditions and limitations under which the governor may act in making such removal, the idea is precluded that there should be conditions or limitations not expressed, and the officer removed is not entitled to notice and a hearing prior thereto. (p. 991.)

**OFFICE AND OFFICERS—Judicial Officer—Impeachment.—**

A state superintendent of water division appointed by the governor is not a judicial officer, so as to entitle him to the right not to be removed from office except by impeachment. (p. 993.)

H. W. Moore, for the relator.

W. E. Mullen, attorney general, for the respondent.

**49** BEARD, J. This is a proceeding commenced in this court, as a court of original jurisdiction, by the relator against the state auditor, praying for a writ of mandamus to compel the auditor to allow, draw and sign a warrant on the state treasurer for one hundred dollars, being the amount of the salary claimed by the relator as superintendent of water division No. 4 of the state of Wyoming for the month of March, 1905. The relator presented his petition to Chief <sup>50</sup> Justice Potter, and an alternative writ was issued by him and made returnable to this court. The facts necessary to an understanding of the case, briefly stated, are as follows: On February 27, 1903, the relator was appointed, by the then governor of the state, superintendent of said water division for the term of four years, which appointment was confirmed by the state senate; he qualified, a commission was issued to him, and he entered upon the discharge of the duties of the office and continued so to do until March 16, 1905, when he was removed from said office by the present governor of the state; the cause for such removal, as stated by the governor in writing and filed in the office of the Secretary of State, being as follows:

“Proof of incompetency of O. A. Hamilton, Division Superintendent. Referring to tabulation of proofs taken in adjudicating rights on Green River and tributaries: 330 proofs submitted—of these 105 show no errors on face of tabulation, but of the 105 several petitions for corrections of descriptions of lands irrigated have been received and granted. Eighteen petitions for rehearing were received altogether from this work and fully 200 would have been received if the errors had not been discovered in the office of the board of control prior to the issuance of final certificates of appropriation. The errors thus corrected by the board of control were of different character. Eighty-three per cent were wrong descriptions of irrigated lands; eleven per cent the date of priority; four per cent in the names of ap-

propriators, and two per cent in unintelligible writing, miscalculations, etc. Owing to the necessity for reviewing the entire work, the state engineer and superintendent of water division No. 1 went into the field in pursuance of an order of the board of control reopening the decree for correction. The entire matter was gone over and many more corrections were made than were brought to the attention of the board through correspondence. This work has cost the state over \$200 in expense alone, besides the time of the administrative officers. It has cost the people much more in <sup>51</sup> time and money. Similar errors have been found in all other proofs submitted by Mr. Hamilton. During the season of 1904 he spent a large part of his time mining along the Sweetwater River. He has never performed his part in the systematizing of the records pertaining to his division and the card index belonging to that division is in the office of the board at Cheyenne.

"The photographic reproduction of a page of the Green River tabulation (a part of the records of the office of the board of control) is attached hereto. It is typical of the remainder of the tabulation."

The photograph referred to was not attached to the pleadings nor offered in evidence.

On March 18, 1905, the governor appointed a successor to relator, until the convening of the next session of the Senate, who immediately qualified. The relator was notified of his removal, but he was not notified to appear and show cause why he should not be removed, nor was he given a hearing, upon charges, before he was removed. He testifies, however, that about February 20, 1905, he had a conversation with the governor about his resigning and that he concluded not to resign, and that the governor then told him that if he did not resign by March 15th, he would be removed, and that the governor gave as his reasons for such contemplated removal that relator's reports were erroneous, and that the state engineer and relator could not agree, and that it was not a good plan to have a board where its members were at loggerheads.

The claims of the relator are:

1. That he is a state officer appointed for a definite term and, therefore, cannot be removed from office except by impeachment.
2. That chapter 59 of the Session Laws of 1905



giving the governor power to remove from office appointive officers, is unconstitutional. 3. That if said act is constitutional, such removal could not be made by the governor without charges being preferred, <sup>52</sup> notice to relator and a hearing, and that the attempted removal by the governor was null and void.

On behalf of respondent, the attorney general objects to the consideration of the questions involved on the ground that the title to the office is involved and that mandamus is not the proper remedy, and cites Mechem on Public Officers, section 217, where the rule is stated as follows: "It is well settled that mandamus will not lie to try the title to an office, or to compel admission to it, or to obtain possession of it, or to oust an usurper from it. In all these cases the party must resort to his remedy by quo warranto." Numerous authorities are cited, which, however, add nothing to the above statement. But the present proceeding is not brought against the appointee to succeed the relator, nor is the prayer to restore the relator to office. It may be conceded that quo warranto is the proper remedy to try the title to office between contending parties. Mandamus would be unfair as well as inadequate, for the reason that it would be an attempt to secure an adjudication with but one of the parties claiming the office before the court. An examination of the prayer of the petition, if the facts stated warrant the relief prayed for, is frequently the best test of the nature of an action or proceeding, and that test applied to this case indicates that the purpose of the proceeding is not to determine the right to the office as between the relator and the appointee, but to compel the auditor to issue a warrant. The relator claims to be in office and entitled to the salary, and that it is the duty of the auditor to issue a warrant therefor; while the respondent alleges that the relator has been removed from office and is not entitled to its emoluments and that he has no duty to perform. The court will go no further in its decision than is requisite to determine the precise question presented by the issues. A decision in favor of the relator could mean no more than that he is a de facto incumbent of the office and entitled to the emoluments thereof. It could not adjudicate as between relator and appointee as to which has the better title <sup>53</sup> to the office. It could not declare the relator's title unassailable.

On the other hand, a decision adverse to the relator would doubtless mean that he had been effectively removed, and has no right to the office. But there is nothing unfair to him in deciding the question, for his claims have been fully presented and argued to the court. In either case the rights of the appointee, who is not a party, are not involved, and the case is not one to try the title to an office between contesting claimants. The right of the court to entertain mandamus proceedings for the determination of the questions properly presented, notwithstanding the incidental inclusion of other matters more fitly presented by a proceeding in quo warranto, has been upheld. In *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644, the supreme court of California said: "An application for a writ of mandate to try title to office would be answered at once by the suggestion that the law affords adequate process and procedure by an action of quo warranto or usurpation of office. But when the writ is invoked to enforce a specific duty, and remedies at law are inadequate, aid will not be refused merely because occupancy, or incumbency, or title is incidentally involved. It will act under such circumstance as does equity, and inquire into and determine rights so far as; but no farther than, may be necessary to the granting of the relief sought": See, also, *High on Extraordinary Legal Remedies*, 3d ed., sec. 108. We are, therefore, of the opinion that we are not going outside of established legal rules in entertaining the application to the extent merely of determining whether or not the relator is entitled to the relief prayed for. The relator is entitled to the salary if he is the officer he claims to be; and he is such officer unless he has been removed. Therefore, the legality of the governor's action in that respect is the only question to be decided.

We will first consider the relator's contention that he is a state officer and cannot be removed except by impeachment. The constitutional provisions with regard to his appointment<sup>54</sup> are found in article 8 of the constitution, which provides that the legislature shall by law divide the state into four water divisions, and provides for the appointment of superintendents thereof; that there shall be a state engineer, who shall be president of the board of control, and shall have general supervision of the waters of the state and of the officers connected with its distribution. It further provides for a board of control to be composed of the state engineer and the

superintendents of the water divisions. In pursuance of these constitutional provisions, the first state legislature (S. L. 1890-91, c. 8; Rev. Stats. 1899, secs. 848, 850) divided the state into four water divisions and provided for the appointment of a superintendent for each division by the governor, with the consent of the senate, who should hold his office for four years, or until his successor is appointed and shall have qualified; and providing that he shall have general control over the water commissioners of the several districts within his division, and shall under the general supervision of the state engineer execute the laws relative to the distribution of water in accordance with the rights of priority of appropriation, and perform such other functions as may be assigned to him by the state engineer. It was under these provisions that the relator was appointed.

The constitutional provisions with regard to the impeachment and removal of officers are contained in sections 18 and 19 of article 3, and are as follows:

"Sec. 18. The governor and other state and judicial officers, except justices of the peace, shall be liable to impeachment for high crimes and misdemeanors, or malfeasance in office.

"Sec. 19. All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law."

The legislature passed an act (S. L., c. 59, approved February 20, 1905) as follows: "Any officer or commissioner of the state of Wyoming who shall hold his office or commission by virtue of appointment thereto by the governor, or by the governor<sup>55</sup> by and with the advice and consent of the senate, may be removed by the governor from such office or commission for maladministration in office, breach of good behavior, willful neglect of duty, extortion, habitual drunkenness, or any other cause deemed by the governor to justify and warrant such removal; Provided, Reason for such removal shall be filed in the office of the Secretary of State in writing, subject to inspection by any person interested." It was under the power conferred by this act that the relator was removed.

It will be observed that the causes for impeachment are, "For high crimes and misdemeanors, or malfeasance in office," including only criminal conduct or positive wrongdoing, while officers not liable to impeachment may be re-

moved for "misconduct or malfeasance in office," thus very greatly extending the causes for removal authorized to be provided for by law. We are very clearly of the opinion that it was not the intention of the framers of our constitution to require that the jurisdiction of the high court of impeachment should be invoked to try and remove minor and subordinate officers, especially as the term of office of many of such officers would expire by limitation during the session of the legislature at which they could be impeached, and, again, that court would have no jurisdiction in cases of "misconduct" not amounting to a high crime or misdemeanor, or malfeasance in office. We are strongly inclined to the opinion, without deciding the point, that the officers liable to impeachment are the governor and other state officers mentioned in section 11, article 4, of the constitution, which does not include the office in question. Certainly, and it has generally been so considered, that only the superior executive and judicial officers of a state are subject to impeachment, and we have found no case where an officer holding by appointment, or an inferior officer of any kind, has been held subject to impeachment. On the other hand, it has been held that such officers are not so subject: 15 Am. & Eng. Ency. of Law. 2d ed., p. 1065; State <sup>56</sup> v. Hewitt, 3 S. Dak. 187, 44 Am. St. Rep. 788, 52 N. W. 875, 16 L. R. A. 413; State v. Smith, 6 Wash. 496, 33 Pac. 974; State v. Burke, 8 Wash. 412, 36 Pac. 281.

The constitutional provisions of these states are similar to ours. The supreme court of South Dakota says: "The constitutions of many of the states contain the same language to our own, defining what officers are subject to impeachment but, so far as we have observed, such language has not been taken to include officers who hold by appointment either by the governor or some supervising board, authorized to make such selection and appointment." The supreme court of Washington has given us a rational view of the subject. "As a general rule, the term 'state officer' is only applied to those superior executive officers who constitute the heads of the executive departments of a state." Again: "The second section provides that the governor and other state and judicial officers shall be liable to impeachment; and the third section provides that all officers not liable to impeachment shall be subject to removal for malfeasance in office, in such manner

as may be provided by law. If 'state officers' should be taken to include all officers who have to do with the state's business, officers of all grades would be subject to removal by impeachment only, and there would be no use for section 3. But it is a matter of general, as well as legal, knowledge that impeachments do not lie against any but the superior officers of a state, and that it is usually limited to the executive and judiciary, and this was the intention of this article": Cases *supra*.

Applying the reasoning of the Washington court, an interpretation of section 18, article 3, of the constitution, which would make it include minor and subordinate officers, would render section 19 meaningless and superfluous. There is no doubt in our minds but that the superintendent of a water division is such an officer as, under section 19, article 3 of the constitution, may be removed in the manner provided by law.

It is argued that the act under consideration (S. L. 1905, c. 59) contravenes the Bill of Rights providing that no <sup>57</sup> person shall be deprived of life, liberty or property without due process of law. But the notion that there may exist a property right in a public office is not generally accepted. "The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him as a public trust to be exercised for the benefit of the public. Such salary as may be attached to it is not given because of any duty on the part of the public to do so, but to enable the incumbent the better to perform the duties of his office by the more exclusive devotion of his time thereto": *State v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228. "A public office is not to be regarded as the property of the incumbent": *Reals v. Smith*, 8 Wyo. 159, 56 Pac. 690. "Subject to constitutional provisions or prohibitions, the authority of the legislature over public offices is complete and absolute": *Lee v. Board of Commissioners*, 3 Wyo. 52, 31 Pac. 1045. It is well settled in this state that the Bill of Rights does not interfere with legislative control over public offices, and that such control is complete within the express constitutional limits. The legislature, however, under the provisions of section 19, article 3 of the constitution, did have express warrant for the passage of an act for the removal of officers not subject to impeachment, and the method of procedure in effecting each removal is not limited by any other constitutional pro-

vision: *Attorney General v. Jachim*, 99 Mich. 358, 41 Am. St. Rep. 606, 58 N. W. 611, 23 L. R. A. 699.

The only question that remains to be considered is the contention of counsel for relator that relator could not be removed, lawfully, without charges being preferred against him, notice of the time and place of a hearing upon such charges, and an opportunity to make defense. Counsel for relator has cited many authorities on this proposition and which sustain the rule as laid down in *Mechem on Public Officers*, section 454, which is as follows: "Where the appointment or election is made for a definite term or during good behavior, and the removal is to be for cause, it is now <sup>58</sup> clearly established by the great weight of authority that the power of removal cannot, except by clear statutory authority, be exercised without notice and hearing, but that the existence of the cause, for which the power is to be exercised, must first be determined after notice has been given to the officer of the charges made against him, and he has been given an opportunity to be heard in his defense." In the two leading cases cited by counsel for the relator (*Coleman v. Glenn*, 103 Ga. 458, 68 Am. St. Rep. 108, 30 S. E. 297, and *Dullam v. Wilson*, 53 Mich. 392, 51 Am. Rep. 128, 19 N. W. 112), the principle is recognized that where the statute so provides, the removal may be made without notice. In the Georgia case, on page 460, the writer of the opinion quotes with approval the above quotation from *Mechem*, and in the Michigan case, on page 402, the court says: "Unless it is the manifest intention of the section under consideration that the proceedings should be ex parte as well as summary, a removal without charges, notice and an opportunity for defense cannot be upheld."

It is true that the rule has been sometimes stated without the qualifying exception in the case of "clear statutory authority." But such statements are evolved from cases where the question did not arise. The later Michigan cases show that officers may be removed without notice where the statute gives such authority, and where there is no constitutional provision prohibiting it: *Halgren v. Campbell*, 82 Mich. 255, 21 Am. St. Rep. 557, 46 N. W. 381, 9 L. R. A. 408; *People v. Stuart*, 74 Mich. 411, 16 Am. St. Rep. 644, 41 N. W. 1091; *Trainor v. Board of County Auditors*, 89 Mich. 162, 50 N.

W. 809, 15 L. R. A. 195. See, also, *Trimble v. People*, 19 Colo. 187, 41 Am. St. Rep. 236, 34 Pac. 981; *People v. Whitlock*, 92 N. Y. 191; *State v. McGarry*, 21 Wis. 496; *State v. Cheetam*, 19 Wash. 330, 53 Pac. 349. From an examination of the authorities, therefore, it seems correct to say that when the legislature has conferred power on the governor to remove an appointive officer having a definite term, and the statute does not provide the procedure, it will not be presumed that such removal may be made without notice and a hearing; but if the authority is expressly given to proceed summarily, no such notice is necessary. If, therefore, the statute under which the removal was made in this case had closed at the <sup>59</sup> semi-colon before the proviso, it might be a question whether notice to the officer and a hearing on charges might not be required. But the legislature having declared that removals may be made, proceeds to prescribe the method or the conditions under which such removals may be made. Having conferred the power upon the governor in language which is plenary, it adds: "Provided, Reason for such removal shall be filed in the office of the Secretary of State in writing, subject to inspection by any person interested," thereby declaring the express conditions and limitations under which the governor may act. Having entered upon the realm of limitation, the enumeration of one condition precludes the idea that there should be others not expressed. "*Expressio unius est exclusio alterius*." To our minds the language of the proviso is inconsistent with the idea of a hearing. The sole restraint upon the action of the governor is the filing of his reasons for the removal, and the consequent check of public opinion. In defining the duties of governor, the constitution (section 5, article 4) provides: "He shall expedite all such measures as may be resolved upon by the legislature and he shall take care that the laws be faithfully executed." Being vested with the power to appoint many subordinate officers for whose conduct he is, in a measure at least, held responsible to the people, it was no doubt deemed wise by the legislature to also invest him with the power of summary removal of such appointive officers for misconduct in office, whatever might be the source of his information and knowledge of such misconduct, so long as in his judgment it existed; and that the filing of his reasons was a sufficient guar-

anty of his good faith, and that the power would not be abused, but would be exercised only when a faithful execution of the laws required it. It is argued that this lodges an arbitrary and unsafe power in the executive. But it may be a question whether the evils that might arise from such a condition would be greater than those growing out of maladministration, or misconduct in office, and the delays to be anticipated from protracted litigation under more cumbersome methods. At any rate,<sup>60</sup> the question is one for the legislature and not for the courts. The law can be repealed if proven to be vicious. Its wisdom does not concern us, for our duty is simply to declare the law as we find it to be. There is no claim advanced by counsel for the relator that the reasons assigned by the governor are not such as, if true, would constitute maladministration or misconduct in office, and they seem to us to be well within those terms: *State v. Slover*, 113 Mo. 202, 20 S. W. 788; *Yoe v. Hoffman*, 61 Kan. 265, 59 Pac. 351; *Century Dictionary*.

We conclude, therefore:

1. That the superintendent of a water division is one of those officers mentioned in section 19, article 3 of the constitution, and that the legislature had the power to provide by law for the removal of such an officer in a summary manner and without notice or a hearing, for one or more of the causes mentioned in said section.

2. That it was the intention of the legislature that removals from office provided for in chapter 59 of the Session Laws of 1905 might be made summarily and without notice or hearing.

3. That the removal of the relator from office by the governor was in accordance with law, and that after such removal, the relator was not entitled to the salary of said office, and that the respondent was justified in refusing to issue a warrant to him for the same.

It is, therefore, considered and adjudged by the court that the writ of mandamus prayed for by the relator be, and the same hereby is, denied. It is further ordered and adjudged that the relator pay the costs of this action. Writ denied.

Parmelee, D. J., concurs.

Potter, C. J., did not sit.



## ON PETITION FOR REHEARING.

BEARD, J. A petition for rehearing has been filed by the relator in this case, accompanied by a brief of his counsel in support of the same.

<sup>61</sup> The only point presented in the brief not discussed in the original brief and argument is, that the relator is a judicial officer and hence comes within the terms of section 18, article 3 of the constitution, and that he could be removed by impeachment only. We think this contention has been fully answered in the negative by this court in *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. 258, where, speaking of the board of control, the following language is used: "The board, it is true, acts judicially, but the power exercised is quasi judicial only, and such as under proper circumstances may appropriately be conferred upon executive officers or boards. The jurisdiction bears some resemblance to that of the land department of the government concerning the disposal of public lands. That department is not regarded as a court, or as a branch of the judicial department; nor is its jurisdiction upheld upon the basis of any authority residing in Congress to establish courts. It is considered as an administrative department, and its powers are held to be quasi judicial only."

The other points presented by the petition were fully presented, argued and considered upon the hearing, and upon re-examination we discover no reason to change the former opinion.

Rehearing denied.

Parmelee, D. J., concurs.

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*Mandamus* does not lie, as a rule, to try title to a public office: See the note to *State v. Gardner*, 98 Am. St. Rep. 834. See, however, *Lawrence v. Ingersoll*, 88 Tenn. 52, 17 Am. St. Rep. 879; *State v. Oates*, 86 Wis. 634, 39 Am. St. Rep. 912; *State v. Hewitt*, 3 S. Dak. 187, 44 Am. St. Rep. 788; *Metsker v. Neally*, 41 Kan. 122, 13 Am. St. Rep. 269.

*Public Officers* are not, ordinarily, removable without notice and opportunity to be heard: *State v. Megaarden*, 85 Minn. 41, 89 Am. St. Rep. 534; *State v. Hewitt*, 3 S. Dak. 187, 44 Am. St. Rep. 788; *State v. Walbridge*, 119 Mo. 383, 41 Am. St. Rep. 663; *Hallgren v. Campbell*, 82 Mich. 255, 21 Am. St. Rep. 557; *Board of Commissioners v. Johnson*, 134 Ind. 145, 19 Am. St. Rep. 88; *Coleman v. Glenn*, 103 Ga. 458, 68 Am. St. Rep. 108.

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## STERRITT v. YOUNG.

[14 Wyo. 146, 82 Pac. 946.]

**EMINENT DOMAIN—Right to Notice and Hearing.**—The owner of property taken from him by virtue of the right of eminent domain is entitled to notice and an opportunity to be heard upon the question of the amount of his compensation. (p. 998.)

**CONSTITUTIONAL LAW—Eminent Domain—Right to Notice and Hearing.**—A statute authorizing the taking of private property under the right of eminent domain must, to be valid, provide for notice to the land owner, and he must be given an opportunity to be heard as to the amount of his damages. (p. 1000.)

**CONSTITUTIONAL LAW—Eminent Domain—Right to Notice.**—A statute authorizing the taking of private property under the right of eminent domain, to be valid, must provide for notice to the land owner of the time and place of the meeting of the appraisers appointed to determine the amount of damages, and if no such notice is provided for, it cannot be implied by the court. (p. 1002.)

**EMINENT DOMAIN—Nature of Proceeding.**—A proceeding to condemn property under the right of eminent domain is not a civil action, nor is it necessary that it should be considered in the ordinary course of legal proceedings. The appointment of appraisers may be confided to any fair tribunal, board or officer and still be due process of law, provided the land owner shall have notice and an opportunity to be heard and he has a right to show, if he can, that no such case has been made out as will authorize the proceeding. (p. 1003.)

McMicken & Blydenburgh, for the plaintiff.

N. R. Greenfield, for the defendants.

**155 BEARD, J.** This action was commenced in the district court of Carbon county by the plaintiff against the defendants for an injunction to restrain the defendants from going upon and constructing an irrigating ditch over and across plaintiff's land. In a supplemental answer filed by defendants they alleged that appraisers had been duly appointed by the county commissioners of said county to view the premises and assess plaintiff's damages for the construction of said ditch, and that said appraisers had viewed the premises and had made due report and return of their ascertainment and assessment of plaintiff's damages; that defendants had paid all costs and expenses incurred by reason of said appraisalment and had offered and tendered to plaintiff the amount awarded to him by said appraisers, which he refused to accept, and that said sum was then deposited with the board of county commissioners with instructions to

the same be paid to plaintiff. It also appears from the pleadings that a petition had been presented to the commissioners by the defendants praying for the appointment of appraisers, and that notice was published by the commissioners of the time when the appraisers would be appointed. There is no allegation in the supplemental answer that any notice was given to plaintiff of the time or place of meeting of the appraisers, or that they gave him any opportunity to be heard as to the amount of such damages, or that he appeared at such meeting. To this supplemental answer a general demurrer was filed by the plaintiff, and the court, upon the request of both parties and on its own motion, deeming difficult constitutional questions to have arisen upon the demurrer, reserved its ruling thereon and certified the following questions to this court for decision, viz.:

"1. Do sections 897, 898, 899 and 900 of the Revised Statutes of Wyoming of 1899 provide a valid way under <sup>156</sup> the constitution of the state of Wyoming by which a private person may condemn the lands of another for a right of way for a ditch to irrigate his own lands?

"2. Are sections 897, 898, 899 and 900 of the Revised Statutes of Wyoming of 1899 and the procedure therein indicated in conflict with section 6 of article 1 of the constitution of the state of Wyoming?

"3. Are sections 897, 898, 899 and 900 of the Revised Statutes of Wyoming of 1899 and the procedure therein indicated in conflict with section 7 of article 1 of the constitution of the state of Wyoming?

"4. Are sections 897, 898, 899 and 900 of the Revised Statutes of the state of Wyoming of 1899 and the procedure therein indicated in conflict with section 32 of article 1 of the constitution of the state of Wyoming?

"5. Are sections 897, 898, 899 and 900 of the Revised Statutes of Wyoming of 1899 and the procedure therein indicated in conflict with section 33 of article 1 of the constitution of the state of Wyoming?

"6. These sections 897, 898, 899 and 900 of the Revised Statutes of Wyoming of 1899, having been originally adopted in 1875, while Wyoming was a territory and before the adoption of the state constitution, were they void at that time, and if so, did they ever become valid laws of the state of Wyoming?"

The sections of the statutes involved in the questions are those which provide the manner in which a private person may exercise the right of eminent domain for the right of way for an irrigating ditch over the lands of another. Section 897 of the Revised Statutes of 1899 provides in substance, that where one's lands are so situated that to irrigate the same it is necessary to construct a ditch for that purpose over the lands of another, he shall be entitled to such right of way.

Section 898 limits the extent of such right of way to a ditch, dike or cutting sufficient for the purposes required.

Sections 899 and 900 provide the manner in which such <sup>157</sup> right of way may be condemned if the owner of the land over which the ditch is to be constructed refuses to grant the same, and are as follows:

"Sec. 899. Upon the refusal of owners of tracts of land, or lands, through which said ditch is proposed to run, to allow of its passage through their property, the persons desiring to open such ditch may present to the county commissioners of the county in which said lands are located, a petition signed by the person or persons, describing, with convenient accuracy, the lands so desired to be taken as aforesaid, setting forth the name or names of the owner or other person interested, and praying the appointment of three appraisers to ascertain the compensation to be made to such owner or persons interested. Upon the receipt of said petition, the said county commissioners shall give notice, at least thirty days prior to the appointment of the said appraisers, by public notice in a newspaper, when published in the county, or by posting three or more notices in three different places in said county, stating that such appraisers will be appointed on the — day of —.

"Sec. 900. The said appraisers, before entering upon the duties of their office, shall take an oath to faithfully and impartially discharge their duties as said appraisers. They shall hear the proofs and allegations of the parties, and any two of them, after reviewing the premises, shall, without fear, favor or partiality, ascertain and certify the compensation proper to be made to said owner, or persons interested for the lands to be taken or affected, as well as all damages accruing to the owner or person interested, in consequence of the condemnation of the same, taken or injuriously af-

fect as aforesaid, making such deduction or allowance for real benefits or advantages as such owner or parties interested may derive from the construction of any such ditch or flume. They, or a majority of them, shall subscribe a certificate of their said ascertainment and assessment, which shall be recorded in the county clerk's office of the county in which said lands are situated, and upon the payment of <sup>158</sup> the compensation (if any) the said person or persons shall have the right of way to construct said ditch or flume." The foregoing are all of the statutory provisions on the subject.

It is contended by counsel for plaintiff that the procedure thus provided and authorized attempts to take, and authorizes the taking of private property without due process of law and without just compensation to the owner, and, therefore, violates both the letter and the spirit of the constitution, and is void.

In considering the question it must be remembered that we are dealing with the question of the constitutionality of the law only, and must assume that all of its requirements are to be fully complied with, and that nothing has been, or will be, done that the statute does not in express terms or by necessary implication require. The proceeding is to be initiated by the filing of a petition by the applicant with the county commissioners of the county in which the lands sought to be taken are located, praying the appointment of three appraisers to ascertain the compensation to be made to such owner or person interested. Upon the receipt of such petition the commissioners are required to give at least thirty days' notice prior to the appointment of said appraisers, stating that such appraisers will be appointed on a certain day. The appraisers are required to qualify by taking an oath. They are to hear the proofs and allegations of the parties, to view the premises and to certify the compensation to be made to the owner, which certificate is to be signed by them, or a majority of them, and shall be recorded in the office of the county clerk of the county in which the lands are situated, and upon payment of the amount so certified the petitioner shall have the right of way to construct said ditch. It is insisted that as the statute makes no provision or notice to the property owner as to the time or place of the meeting of the appraisers, he is deprived of the right

to be heard upon the question of the amount of damages, and for that reason the statute contravenes <sup>159</sup> sections 6 and 32 of article 1 of the constitution. These sections of the constitution are as follows: "Section 6. No person shall be deprived of life, liberty or property without due process of law." "Section 32. Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation."

That the owner of property taken from him by virtue of the right of eminent domain is entitled to notice and an opportunity to be heard upon the question of the amount of his compensation can hardly be questioned. The decisions are almost unanimous on that subject. But the important question presented in this case is, Must the statute so provide? Upon this question there is an apparent, if not real, conflict in the decisions. In many cases it has been held that notice must be given, although the statute does not in terms require it, and that a statute providing for a hearing implies that notice must be given, or the proceeding will be void. A brief review of a few of those cases will be sufficient here.

The case of Whitford Township v. Probate Judge, 53 Mich. 130, 18 N. W. 593, was a writ of certiorari to bring before the supreme court the proceedings of the probate judge appointing a special drain commissioner to construct a ditch to drain certain lands, and to assess the expense of the same against the property benefited. There was no notice given to the land owners of the application or proceedings before the judge of probate, or of the time and place when the same would be heard. It was held that "such notice is always necessary when it is sought to deprive the citizen of his property; and if the notice is not expressly provided for in the law itself, it is in all such cases necessarily implied, and the failure to give such notice renders the proceedings, if otherwise regular, null and void." Chief Justice Cooley in his concurring opinion said: "I do not think <sup>160</sup> it legally competent to confer upon the probate or any other court the power, without notice to the parties concerned to appoint an officer to decide finally upon the question of laying taxes, and to proceed to lay taxes in his discretion.

as has been done here; and if the legislation, under which this so-called commissioner has proceeded, will permit of such action, it is void." Campbell, J., concurred with the chief justice, and the proceedings were held void.

The case of *In re Rood* in South Abington Township, 109 Pa. 118, was certiorari to the quarter sessions in the establishment of a public road. Viewers were appointed and made their report, and it was objected that "legal notice of the meeting of the viewers to make the view was not given." In the opinion it is said: "In the act of 1836 there is no provision made for notice; it may have been supposed that the presentation of a petition to the court, the appointment of viewers, their actual appearance upon the ground, the view and survey of the route, and the filing of their report, were circumstances of such notoriety as would put all parties on their guard (*In re Baldwin and Snowden Road*, 3 Grant Cas. 62), and that the intervention of a whole term of court gave full opportunity for knowledge, and for preparation to resist the confirmation. But, as the appropriation of a man's property and the assessment of his damages, without notice, is repugnant to every principle of justice, it was held in a number of cases, under the act of 1836, notably in *Neelh's Road*, 1 Barr. 355, *Boyer's Appeal*, 1 Wr. 257, and *Central R. R. Co.'s Appeal*, 6 Out. 38, that notice to the property owner is absolutely essential to the validity of the view or assessment." In many other cases it has been held that, although the statute does not expressly provide for notice, the proceedings are void unless notice is given, and that statutes which provide for a hearing imply that notice must be given, and if not given the proceedings are void: *Tracy v. Elizabethtown etc. R. R. Co.*, 80 Ky. 259; *Peoria etc. Ry. Co. v. Warner*, 61 Ill. 52; *Gamble v. McCrady*, 75 N. C. 509; *Baltimore etc. R. R. Co. v. Pittsburg etc. R. R. Co.*, 17 W. Va. 812; *People v. Gilon*, 121 N. Y. 551, 24 N. E. 944; *Strachan v. Drain Commissioner*, 39 Mich. 168; *Dickey v. Pennison*, 27 Mo. 373. Other cases on the question of the necessity for notice might be cited. But an examination of these cases discloses that in but few of them is the constitutionality of the statutes called in question. What is really decided is, that in order to a valid exercise of the right of eminent domain, the land owner must have notice whether the statute in express terms requires it or not; and that unless

notice is given the proceedings are void. It has also been held that, although the statute did not in terms provide for notice, but did provide for a hearing by the appraisers, or commissioners, as they are sometimes called, and notice was actually given, the party could not complain: *Kramer v. Cleveland etc. R. R. Co.*, 5 Ohio St. 140; *Paulsen v. Portland*, 149 U. S. 30, 13 Sup. Ct. Rep. 750, 37 L. ed. 637.

This brings us to the considerations of the question, Must the statute, to be valid, provide for notice to the land owner and must he be given an opportunity to be heard as to the amount of his damages? The statute under consideration provides for notice by the county commissioners that on a certain day appraisers will be appointed, and it is argued that, having been once notified, the land owner must take notice of all subsequent proceedings. But when the commissioners have given the required notice and have appointed the appraisers, their duty and authority in the matter are at an end. They are not authorized to fix the time or place of the meeting of the appraisers, nor is any report to be made to them, and they are without power to confirm, modify or set aside the report of the appraisers. The appraisers, or a majority of them, are to make and sign a certificate of their ascertainment and assessment which is to be recorded in the office of the county clerk, and this certificate, when so made and recorded, and upon payment of the amount so ascertained, gives to the applicant the right of way for the ditch. It is the act of the appraisers <sup>162</sup> that deprives the party of his property, and not the act of the commissioners in appointing them that does so. There is nothing that the commissioners are authorized to do that can in any manner be construed into notice of when or where the appraisers will meet, nor does the statute do so. It is true that the statute says they shall hear the proofs and allegations of the parties and shall review the premises; but how are the parties to know when or where the appraisers will meet for that purpose without notice? In all other proceedings to condemn private property by virtue of the right of eminent domain the statute has provided for notice. The statute providing for the establishment of private roads requires that the county commissioners shall at the time of the hearing of the application cause an order to be issued directing the viewers to meet, on a day named in such order, on the proposed road



and if for any reason they are unable to meet at that time they may fix some other date, but shall be required to give notice in writing of the time and place where they will meet; and an appeal is provided for to the district court: S. L. 1901, c. 11. Similar provisions are made for notice where property is to be taken for a public road: Rev. Stats. 1899, sec. 1918 et seq. Likewise notice is required for the condemnation of a right of way for railroads and for other purposes: Rev. Stats. 1899, sec. 2916 et seq., and sec. 3084 as amended and re-enacted by S. L. 1901, c. 31.

In all such cases, except the one under consideration, the viewers or appraisers are required to make their report to the county commissioners or to the court or judge, and provision is made for review or appeal.

A leading case upon the subject and where the constitutionality of the law was directly raised and determined is found in *Stewart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289. The act there under consideration authorized an assessment to be made against property benefited by the opening of a street, without notice to the owner of the property found to be benefited by the commissioners appointed for that purpose. Earl, J., <sup>103</sup> in delivering the opinion of the court, said: "We shall examine and consider but one question, which we deem decisive of this case, and that is whether the act authorizing the assessment was constitutional. . . . I am of opinion that the constitution sanctions no law imposing such an assessment, without notice to, and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, what the assessment has, in fact, been fairly apportioned. The constitutional validity of the law is to be tested, not by what has been done under it, but by what may by its authority be done."

In *Gatch v. City of Des Moines*, 63 Iowa, 718, 18 N. W. 10, the supreme court of Iowa quotes and approves the foregoing quotation, and held a law unconstitutional that did not provide for notice, and cites many cases in support of the proposition. To the same effect see *Rutherford's Case*,

72 Pa. 82, 13 Am. Rep. 655. And in *Re Mayor*, 34 Misc. Rep. 719, 70 N. Y. Supp. 227, this language is used: "It is manifest, from the reading of the above-cited statute, that, unless included by permissible construction of section 2, there is a total absence of provision for a notice to the parties against whose property an assessment might be imposed. Without such a provision an act which authorizes an assessment must be deemed unconstitutional, since it has the effect of depriving the owner of the property to be assessed of his property without due process of law." In the case of *Board of Education v. Aldredge*, 13 Okla. 205, 73 Pac. 1104, after stating the holding of the courts on the question, the court concludes as follows: "After a careful examination of all of the authorities at our command, we are clearly of the opinion that the statute must stand or fall as enacted by the legislature, and that, where no notice is provided, a court ought not to say that notice is implied; <sup>164</sup> and, as has been said by other law-writers, the question is, not what was done, but what did the statute authorize to be done." It was held in *Siefert v. Brooks*, 34 Wis. 443, that a statute which failed to require notice to be given of the time and place of the assembling of the jury, the act must in that particular be held unconstitutional and void, and the proceedings taken under it also inoperative and wholly void, and it is said: "It is true that section 46 enacts that the jury shall hear the declarations of the parties interested for or against the laying out of the street, and shall take such evidence as a majority of the jury think proper; but this, with no regulation for the giving of some reasonable notice enabling the land owner to appear, must in general, if not always, be found a fruitless and nugatory provision. . . . It is the omission or unconstitutional feature of the statute which vitiates, and that can be cured only by the legislature itself, or in particular cases, it may be, by the waiver or voluntary abandonment of his constitutional rights by the land owner, who has that power." In *Lumsden v. City of Milwaukee*, 8 Wis. 485, the act was held unconstitutional because it did not provide that the jury should be sworn before acting, and the fact that they were actually sworn did not render their acts valid: See, also, *McGavock v. Omaha*, 40 Neb. 64, 58 N. W. 543; *Kundinger v. Saginaw*, 59 Mich. 355, 26 N. W. 634; *Langford v. Commissioners of Ramsey Co.*, 16 Minn. 375.

We are of the opinion that the better reasoning is that the statute must provide for notice, and that where none is provided, it should not be implied by the court. Especially in view of the clear and explicit provisions for notice contained in our statutes in all other cases where the right of eminent domain is authorized to be exercised, and in view of the further fact that not only in this case, but in those arising under similar statutes in other states, the appraisers have acted upon the assumption that they were not required to give any notice. Again, if notice is implied, what kind of notice shall be given? Certainly, it must be legal notice,<sup>165</sup> and in the absence of a statute authorizing notice by publication or posting, in a proper case, none but personal notice would be legal, and it might often occur that by reason of nonresidence of a party, or where his residence was unknown, no notice could be given. We think these views are also supported by the weight of authority, and we are constrained to hold that the statute in question violates the provisions of section 6 and section 32 of article 1 of the constitution, and is, therefore, void. It is contended by counsel for defendant that to so hold will unsettle the title to the right of way of many ditches in the state which have been acquired under the statute. But that argument is not sound, because if the compensation has been accepted by the land owner it matters not how it was arrived at, and he cannot be heard to complain after having accepted the money.

Several other points have been presented by counsel for plaintiff which may be referred to briefly. It is contended that as the statute does not provide for any hearing before the county commissioners, the plaintiff would have no right to contest the sufficiency of the petition, and that the commissioners must appoint appraisers in any event; and if this be not true, then the statute invests the commissioners with judicial powers which can only be exercised by the court. The conclusions at which we have arrived renders it unnecessary to decide these questions, but it may not be out of place to say here, that the provisions of the statute are very meager and involve much uncertainty. This will no doubt be corrected, should the legislature pass another act on the subject. The proceedings to condemn property under the right of eminent domain is not a civil action, nor is it necessary that it should be considered in the ordinary

course of legal proceedings. The appointment of appraisers may be confided to any fair tribunal, board or officer and still be due process of law, provided the land owner shall have notice and an opportunity to be heard; and he would have the right to show, if he could, that no such case was <sup>166</sup> made as would authorize the commissioners to act: Lewis on Eminent Domain, 2d ed., pp. 881, 882.

The first question submitted by the district court is, therefore, answered in the negative, and as it includes the second, third, fourth and fifth questions, it is a sufficient answer to each of them, and also eliminates from consideration the sixth question submitted.

Potter, C. J., and Van Orsdel, J., concur.

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*Under the Power of Eminent Domain* property may be condemned for the purpose of furthering irrigation: Nash v. Clark, 27 Utah, 155, 101 Am. St. Rep. 953; note to Zircle v. Southern Ry. Co., 102 Am. St. Rep. 831.

*Notice to the Land Owner* is usually regarded as indispensable to the exercise of the power of eminent domain: Charleston etc. Ry. Co. v. Hughes, 105 Ga. 1, 70 Am. St. Rep. 17; Rutherford's Case, 72 Pa. 82, 13 Am. Rep. 655.

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## HEALY v. SMITH.

[14 Wyo. 263, 83 Pac. 583.]

**INJUNCTION.**—Equity will not Lend Aid by injunction to enforce mere moral obligations. (p. 1013.)

**INJUNCTION—Pasturing Public Lands.**—One stock-grower cannot enjoin another from grazing or pasturing his livestock upon the public domain. (p. 1013.)

**TRESPASS—Cattle Running at Large—Uninclosed Lands.**—Actionable trespass is not committed by cattle lawfully running at large, wandering upon and depasturing uninclosed lands of a private owner, but the owner of such cattle is not permitted to willfully and knowingly drive them upon the uninclosed premises of another against his consent, without answering in damages therefor. (p. 1014.)

**PUBLIC LANDS—Grazing Rights upon.**—Under an implied license from the United States government, the public lands are free to everyone who may seek to use them for grazing or pasturing livestock, so long as they are unappropriated and not expressly reserved or set apart for other public purposes. (p. 1015.)

**PUBLIC LANDS—Grazing Rights upon—Prior Occupancy.**—The United States government has never been a party to any arrangement, tacit or otherwise, between stock-growers in the matter of range rights, or the occupation of the public lands, and at no time

has it recognized the right or claim of any person, or number of persons, to the exclusive use of the public lands for grazing or other purposes, on account of prior occupancy or otherwise. So far as the government is concerned, the theory at all times prevails that the vacant public lands are public commons, free to the use of all citizens alike. (pp. 1015, 1016.)

**PUBLIC LANDS—Right to Graze Sheep Thereon.**—By merely grazing a herd of sheep under the charge of a herder upon vacant public lands, the owner of the herd does not usurp the exclusive use or possession thereof, in the sense, at least, in which exclusive use or possession of the public domain is declared or held unlawful or opposed to public policy, and in the absence of statutory provision or other governmental regulation to that effect, there is no authority for confining the privilege of grazing upon the public lands to animals running at large, and denying that privilege to sheep under the control of a herder. (p. 1018.)

**PUBLIC LANDS—Right to Graze—Watering Places.**—The fact that nearly the entire available water supply for the watering of livestock is situated upon small holdings of private lands within a large territory, containing large bodies of public lands, constitutes no ground for an injunction restraining nonland-owning owners of sheep or other livestock from grazing the vacant public lands within the territory in question. (p. 1018.)

**PUBLIC AND PRIVATE LANDS—Water Supply—Right to Graze.**—Persons who have the right to graze their sheep on public lands have no right to willfully and knowingly direct or drive their sheep upon private lands, although they are uninclosed, and may contain the only available or most convenient water supply in a particular neighborhood. (p. 1019.)

**TRESPASS—Right to Pasture Uninclosed Lands—Livestock in Charge of Herder.**—The rule that actionable trespass is not committed when domestic animals which are lawfully permitted to run at large go upon and depasture uninclosed lands of a private owner, does not obtain in the case of livestock under the control of a herder, or whose movements are directed by the owner or others. (p. 1019.)

**TRESPASS—Right to Pasture Uninclosed Lands.**—The owner of uninclosed lands is presumed to know that certain kinds of livestock are allowed by law and custom to run at large, and that such animals will likely wander upon his land, and he is, therefore, held to assume the risk of such trespasses, by the act of leaving his premises open and unprotected by a lawful fence. (p. 1019.)

**TRESPASS—Grazing Uninclosed Land.**—One cannot avoid liability for willfully driving cattle or sheep upon the premises of another, though uninclosed, knowing the land to belong to a private owner, and especially is this true when it is known that the land owner has forbidden such act. (p. 1019.)

**INJUNCTION Against Pasturing Uninclosed Lands.**—As to animals wandering at large in a lawful manner, equity will not enjoin their owner from allowing them voluntarily to trespass upon and depasture uninclosed private premises. (pp. 1020, 1021.)

**INJUNCTION Against Depasturing Uninclosed Premises.**—In a proper case, where the other necessary elements of equity jurisdiction are present, an injunction will lie to restrain a livestock owner from willfully and knowingly driving or turning his stock upon the uninclosed premises of a private owner. In such case it is, however, necessary to show a reasonable probability of the commission of the

wrongful act and a well-grounded apprehension of resulting injury. (p. 1019.)

**INJUNCTION Against Depasturing Uninclosed Land.**—The mere fact that a person owns a tract of uninclosed land, and that another owns a herd of sheep which he proposes to graze upon the public land in the same locality, will not justify an injunction to restrain him from driving his sheep upon such uninclosed land. (p. 1021.)

**TRESPASS—Depasturing Uninclosed Lands—Injunction.**—A single act of trespass committed by an owner of livestock upon two of a number of private uninclosed tracts of land without any threat of continuance, or any showing of permanent injury, is not sufficient ground for an injunction restraining such owner from trespassing upon all of the private lands in the locality in dispute, which consists largely of public lands. (pp. 1021, 1022.)

Lonabaugh & Wenzell, for the plaintiffs in error.

W. S. Metz, J. L. Stotts, M. B. Camplin and S. Smith, for the defendants in error.

**272 POTTER, C. J.** The defendants in error, thirteen in number, joined as plaintiffs in bringing this suit against the present plaintiffs in error and several other parties as defendants, to enjoin alleged threatened trespasses with sheep upon lands alleged to constitute, and for many years to have constituted, the common or joint range and grazing or pasture ground for the cattle and horses owned by the several plaintiffs. As described in the original petition, the lands constituting such range consist of nine entire townships, according to the United States survey, viz.: Townships 45, 46, 47 and 48 of ranges 74 and 75, and township 44, in range 75; and several tracts, varying in area from forty acres to a section, scattered here and there through a number of other adjoining or neighboring townships east, south and west of said nine townships, which last-mentioned tracts are respectively either owned or held under lease by **273** one or the other of the plaintiffs. But according to the second amended petition, upon which the cause was tried, the range comprises all the lands in every township mentioned in the petition, thus including a territory embracing twenty or more townships.

In nearly every township within such territory there are a few scattering tracts of land held by private ownership and belonging to one or other of the individual plaintiffs but no tract so held is owned by the plaintiffs or any number of them jointly. All the remaining lands, and they very largely predominate, are vacant, unappropriated pub-

lie lands of the United States. A few instances will serve to illustrate the proportion between the public and private lands and their comparative situation. In township 48, range 75, the only private lands are school sections 16 and 36, and forty acres in section 22. In the township adjoining on the east, school sections 16 and 36, and one hundred and sixty acres in section 23, are the only lands held by any sort of private ownership, while in the next eastern township, the private lands are confined to section 36. In township 47, range 75, there are no private lands. In the adjoining township on the south, viz., 46, range 75, the private lands are section 16, forty acres in section 5, one hundred and twenty acres in section 7, the south half of section 19, and the northwest quarter of section 29. In the other townships, with perhaps two exceptions, the proportion of public lands is even greater. In one township, viz., 46, range 72, the private lands probably amount to three sections, mostly located in the two southern tiers of sections. All the lands in the entire territory referred to, public and private, are open and unclosed, and none of them appear to have been cultivated.

The plaintiffs below are severally, not jointly, owners of horses and cattle, and they are, and have been for many years, severally engaged in the livestock business, raising, feeding, grazing and disposing of livestock in Weston county, wherein the lands aforesaid are situated, and are taxpayers in such county. The cattle and horses of the several <sup>274</sup> plaintiffs run at large, and it is alleged in the petition that the plaintiffs are, and for years have been, in possession of all the lands aforesaid, including the government lands, and are the owners and in possession of all the springs, streams and waters thereon; and that the same are in actual use by the plaintiffs in the grazing, feeding and watering of their cattle and horses; and that the only means for the subsistence of such animals from the commencement of the suit, November 24, 1902, until the spring of 1903, are the grasses and herbage upon said lands and the waters thereon.

It is alleged in the petition that the defendants, and each of them, are possessed of large bands of sheep, and, at the time of the commencement of the suit, were in close proximity to the lands aforesaid, and had declared their intention of going upon said lands, and to usurp the same to

their own exclusive use, and to graze and feed their sheep upon the herbage and grasses growing on said lands, and to water their sheep from the waters thereon; and had threatened, and were proceeding to carry the threat into execution, to enter upon said lands and waters for the purposes aforesaid, without the consent of plaintiffs, and in violation of their rights.

It was alleged, and evidence was introduced to establish it as a fact, that the effect of taking several large bands of sheep upon the lands described, or upon any range, would be to take the same into the exclusive possession of the sheep owners, for the reason that the habits of sheep in grazing and traveling are such that cattle or horses cannot remain or graze upon the same range, or in the same immediate locality; that sheep trod out the grass roots, eat the grass close to the ground, and that as they are closely herded in bands approximating two thousand five hundred or three thousand head, attended by herders and dogs, cattle and horses are necessarily compelled to abandon any range upon which sheep are so brought. It was, therefore, alleged that the effect of the threatened acts of the several defendants would be to <sup>275</sup> destroy the grasses upon the range, deprive the plaintiffs of the necessary means of subsistence for their cattle for the then ensuing winter, and the exercise by defendants of exclusive possession of the said range.

It was also alleged that the defendants had ample range and pasture facilities and water for their sheep in ranges 76 and 77, west of the lands in controversy, which range had been formerly occupied by plaintiffs, but had been abandoned by them to the defendants; and that the use of the present range of plaintiffs was not necessary for the care or sustenance of the sheep of the defendants.

The original petition did not specify the particular ownership of the private lands; but in the amended petition those facts are set out by stating the name of the owner of each tract of private land; and, from such allegations, which were admitted on the trial to be true, it appears that five only of the plaintiffs own or have any title to any land within the territory composing the range aforesaid; and that the majority of the lands held in private ownership are owned by one of the plaintiffs, viz., George A. Keeline, and he owns one or more tracts in nearly every town-



ship. Hence, it appears that the various tracts owned by him are widely separated, some of them being in the neighborhood of thirty miles apart.

Spencer K. Smith, also one of the plaintiffs, owns, or has a legal estate in, a single tract, viz., section 16, in township 48, range 74. Frank Smith, another plaintiff, owns or has leased the two school sections in township 44, range 75, forty acres in section 13, and one hundred and twenty acres in section 22, in the same township. The firm of George A. Keeline & Son, who are also plaintiffs, own, or have a legal estate in, a few tracts in three or four townships, not exceeding a section in acreage in either township; and each one of their separate tracts is located several miles from the others, there being at least ten or fifteen miles between some of them. Oscar Keeline is alleged to be the owner of a forty-acre tract on the extreme western edge of the region in <sup>276</sup> question, eighty acres in the extreme southeastern part, and a single forty-acre tract in one of the nine townships aforesaid. None of the other plaintiffs, two of whom are corporations, one a partnership, and the others private individuals, are alleged or shown to own, or to have title to, any land in the described territory. In the amended petition, however, in connection with the allegation that one of the plaintiffs—naming him—owns a tract particularly described, it is alleged that such owner, and certain of the plaintiffs—naming them—are and were at all times mentioned in the petition in the possession and entitled to the possession of the same. The effect of such allegations is that though a single plaintiff is the owner of the tract described, the others, who are named, are jointly with him in possession and entitled to the possession thereof. But some of the plaintiffs, at least three in most instances, are omitted from those allegations; and there is therefore no allegation that all of the plaintiffs are even jointly in possession or entitled to the possession of any tract of private land.

The object of the suit, however, was evidently not so much to enjoin an invasion of the private lands by the heep of the several defendants, as to prevent such sheep from being brought upon any of the lands, public or private, within the described territory. The allegations as to private ownership of scattering uninclosed tracts would seem to have been inserted by the pleader upon the theory

that they would more clearly show the right of plaintiffs to the range, the watering places for livestock being located upon such private lands. No distinctive threats or anticipated injuries are alleged in respect to the private lands. In setting forth the acts threatened by defendants, the public and private lands are not distinguished except so far, perhaps, as the defendants are charged with an intention or threat to water their sheep from the water belonging to the plaintiffs. The injury which it is alleged the plaintiffs will suffer if the threatened acts of defendants be carried into execution is the deprivation of their <sup>277</sup> usual and customary range for the grazing of their cattle and horses.

Upon the filing of the petition a temporary restraining order was issued by the district court commissioner, in the absence of the judge from Weston county, where the suit was instituted. With some immaterial modifications that order continued in force until the trial of the cause and final judgment in 1904 in the district court in Sheridan county, to which county the cause had been transferred for trial. During the trial the cause was dismissed on motion as against some of the defendants, and the judgment rendered in the cause which is here complained of was rendered against the present plaintiffs in error only, viz., Patrick Healy, Sr., Adam Patterson, and Patrick Healy, Jr., partners as Healy, Patterson & Healy.

The judgment made perpetual the temporary restraining order, forever enjoining the above-named parties, plaintiffs in error here, from in any manner trespassing, or driving, pasturing or feeding their bands of sheep over or upon the private lands in the joint use and occupancy of the plaintiffs set forth in the petition; from in any manner using or polluting the waters upon such lands, and from in any manner molesting, disturbing, or driving with dogs, or in any way interfering with the herds of horses and cattle belonging to plaintiffs while ranging upon the public government lands in the vicinity of said private lands or elsewhere upon the public domain, and judgment was also given against the plaintiffs in error for costs.

It will be observed that the judgment ignores the question of trespassing or grazing upon the public lands. Though as to such lands there is no express dissolution of

the temporary restraining order, the injunction is confined to the lands held by private ownership, so far as trespassing upon lands is concerned; and a dissolution as to the public lands was probably intended and is doubtless to be implied. The findings, however, are not entirely silent as to public lands. The court stated its conclusions of fact <sup>278</sup> and law separately. It found that the plaintiffs were and had been in the joint use and occupancy of the private lands set out in the second amended petition; that they were jointly using and occupying the government lands adjoining and in the vicinity of said private lands in the feeding, grazing, ranging and management of their horses and cattle; that said private and public lands constituted the home range of the plaintiffs for their cattle and horses; that the grass growing thereon was necessary for the sustenance and maintenance of the horses and cattle during the winter of 1902 and 1903, and has continued to be necessary for that purpose; that the defendants, at the time of the commencement of the suit, were owners of large bands of sheep in the vicinity of such lands, and if said sheep were allowed to pasture upon the private lands and the home range on the public domain, such use would destroy the pasturage of both the public and private lands, and render the same worthless for the use of plaintiffs during the winter aforesaid, and that irreparable injury would result to plaintiffs, and each of them, by such destruction of the grass and herbage on the private lands in their joint use and occupancy. It was further found that the particular defendants who are plaintiffs in error here were threatening and were about to drive and pasture their sheep upon the private lands, at the commencement of this suit; and that, after the commencement of the suit, they did so drive and pasture their sheep upon the private lands, in the joint use and occupancy of the plaintiffs, and threatened to continue and repeat such trespasses. The court also found that said defendants disturbed and molested, and unlawfully drove with dogs, the horses and cattle of plaintiffs while ranging on the public lands and said home range, and that they will continue to do so, unless restrained by the order of the court; that there was ample feed elsewhere than upon the said range of the plaintiffs for the sheep of defendants.

Upon the findings of fact thus briefly outlined, the court announced as conclusions of law: 1. That the temporary <sup>279</sup> restraining order was properly granted and should be made perpetual, forever restraining these plaintiffs in error from trespassing with their bands of sheep and otherwise over or upon the private lands, and from the use and pollution of the waters thereon; 2. That they should be restrained from molesting, disturbing or driving with dogs, the cattle and horses in the joint control and management of the plaintiffs while ranging upon the public lands described in the petition; 3. That the plaintiffs have no speedy or adequate remedy at law, and that injunction is their proper remedy.

Though the temporary restraining order was held to have been properly granted, it was made perpetual as to the private lands only, which constituted a very small fraction of the area embraced in the temporary order. If that order had indeed been rightfully granted, and there was any ground for its continuance, there would seem to be no apparent reason for confining its future application. Had the court found that it had been properly granted as to the private lands, but wrongfully as to the public lands, the findings would, we think, be more consistent, or at least better understood. From the fact that the court found that injury would be suffered by the plaintiffs in consequence of the pasturing of defendant's sheep on the public lands, that the defendants had ample pasturage elsewhere without invading the range of plaintiff, and that the temporary order, which embraced the entire range, public as well as private lands, had been rightfully granted, it seems apparent that some effect was accorded the allegations and proofs as to the range inclusive of public lands, and it is not improper to be assumed that the allegations and proofs respecting the range and the public domain therein, in some measure at least, induced the final judgment perpetuating the injunction in part. Otherwise the findings concerning the public lands, in the absence of a stated conclusion respecting them, are totally unexplained.

The court may have recognized a want of equity in the case as to the public lands. If so, a finding to that effect <sup>280</sup> would have been appropriate, and the injunction should have been dissolved as to these lands. But upon the face of the findings the theory is warranted, we think, that the threat

and acts respecting the public lands, or the range as an entirety, were in some degree at least deemed to support the judgment that was entered.

But upon a careful consideration of the record we are clearly of the opinion that the judgment cannot be sustained in any particular. It is manifest that since the judgment, the theory of the case from the standpoint of the plaintiffs has greatly changed since the trial. Up to the time of trial, and during the trial, the plaintiffs were insisting upon their right to the range, public lands as well as private lands, to the exclusion of the defendants. Much of the testimony introduced on behalf of the plaintiffs is to be understood upon no other theory. The private lands were adverted to in the testimony only incidentally, and no tract held in private ownership, with a single notable exception, was referred to by description or identified by any witness.

And though it is now contended by counsel for plaintiffs below that the injunction ought to be sustained as to private lands, because the defendants have no right to trespass thereon, and it is conceded that the plaintiffs have no exclusive right to the public lands, it is nevertheless argued, and we are at liberty to assume some purpose in the argument, that equity ought to enjoin one stock-grower, who has plenty of feed on his own range, from going upon and depasturing the range occupied by another, though such range consists of public lands. But that argument ignores the elementary principle that equity will not lend the aid of its injunctive power to enforce mere moral obligations: *High on Injunctions*, sec. 20.

No case has been cited holding that one stock-grower may enjoin another from grazing or pasturing his livestock upon the public domain. We believe that whenever the question has been presented the right to an injunction for <sup>281</sup> such a purpose has been denied: *McGinnis v. Friedman*, 2 Idaho, 93, 17 Pac. 635; *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. Rep. 305, 33 L. ed. 618, 5 Utah, 591, 18 Pac. 633; *Marin v. Platte Valley Sheep Co.*, 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093. In *McGinnis v. Friedman*, 2 Idaho, 393, 17 Pac. 35, the suit was very similar to the one at bar. It was sought to enjoin the pasturing of sheep upon public lands which had been used by the plaintiffs as a cattle range. The injunction was denied. The court said: "The appellants in this case do not pretend to connect themselves with the land

by color of title, or to hold the same under any possessory claim or right, with a view of entering the same under any of the general laws of the United States; hence we are unable to see that they have shown in themselves any clear legal or equitable right to the pastures grown upon the said lands." The claim was made there, as here, that the plaintiffs had a right by virtue of their former exclusive possession. But the learned court very pertinently remarked that a court of equity should not interfere to enforce such a claim by injunction, in view of the act of Congress forbidding the assertion of a right to the exclusive use and occupancy of any part of the public lands without claim, color of title made or acquired in good faith with a view to entry under the land laws.

The settlers upon the public domain in the territory embraced within the public land states customarily, without hindrance or objection on the part of the government, enjoyed the vacant lands as public commons for the free pasturing of domestic animals, which, according to their custom, were allowed to run at large. In consequence of such custom and the uninclosed condition of the country in the early days of its settlement the common-law rule that required a man to confine his cattle or else respond in damages for their trespasses upon the uninclosed premises of his neighbors was held not to prevail. On the contrary, the doctrine was established that actionable trespass was not committed by cattle lawfully running at large, wandering upon and depasturing uninclosed lands even of a private <sup>282</sup> owner: *State v. Johnson*, 7 Wyo. 512, 54 Pac. 502. But an owner is not permitted, under that doctrine, to willfully and knowingly drive his cattle or other livestock upon the premises of another, though they be uninclosed, against the consent of the owner of the premises: *Cosgriff v. Miller*, 10 Wyo. 190, 98 Am. St. Rep. 977, 6 Pac. 206.

The custom of making free use of the public lands for the purposes aforesaid, which had its inception in the region where arable lands were plentiful, culminated in the use, unrestricted save as to capacity, of the vast areas of unpeopled and uninclosed public lands on the arid prairies and mountain ranges of the west for the raising of great herds of cattle, horses and sheep, without other means of sustenance than that obtained by grazing upon the native grasses and herbage.

And in this section of the country, largely depending upon the free grazing of the public domain, stock-growing became a gigantic industry.

The government made no attempt to interfere with this use of the public domain, so long as it remained open to everyone seeking to enjoy the privilege, and not until a comparatively recent period did Congress or any department of the government make any express provision or declaration upon the subject. Having for so long a time acquiesced in the use aforesaid of its unappropriated and unreserved lands, it became understood that it impliedly licensed such use; and the existence of such an implied license was judicially announced by the supreme court of the United States in the case of *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. Rep. 305, 33 L. ed. 618. Under that license the public lands were and are free to everyone who may seek to use them for grazing or pasturing livestock, so long as they are unappropriated and not expressly reserved or set apart for other public purposes.

No doubt induced by the idea of self-protection and even more laudable sentiments, there existed in the range country among neighboring stock-growers a sort of moral recognition of a prior and better right in the first occupants of any range, at least if the same was stocked to its fair <sup>283</sup> capacity; though the moral obligation supposed to rest upon one owner of livestock not to turn his cattle or other stock upon his neighbor's range did not prevent the territory of a prior occupant from being more or less invaded, if not by former neighbors, then by strangers or newcomers; and the more frequent disputes that have arisen in recent years, usually in consequence of the taking of sheep into what had theretofore been regarded or claimed as strictly cattle territory, have attracted the attention of government, so that now the question of suitable governmental control of the use of the public grazing lands is being agitated.

But the government was never a party to any arrangement, tacit or otherwise, between stock-growers in the matter of range rights, or the occupation of the public lands, and at no time has it recognized the right or claim of any person, or number of persons, to the exclusive use of the public lands for grazing or other purposes, on account of prior occupation

or otherwise. So far as the government is concerned, the theory at all times prevailed that the vacant public lands were public commons free to the use of all citizens alike.

With the incoming of a constantly increasing number of settlers, and the rapid passing into private control, by entry under the land laws, of the available lands along the natural streams, as well as the gradual overstocking of the range in some localities, and the encroachments by sheep owners with sheep in the charge of herders in others, men here and there began to claim and exercise exclusive control over the lands embraced within their customary ranges, and endeavored to prevent others from grazing thereon. This assumed control was, in numerous cases, indicated by surrounding the range or a part of it with a fence.

Such abuses of the privilege of grazing upon the public lands were soon brought to the knowledge of the officers of the land department and other government officials, and doubtless caused the first official declarations on the subject. <sup>284</sup> The commissioner of the general land office, in his annual report for 1882, said: "The unimpeded progress of settlement will in due time bring the whole of the territory of the United States within the compass of private ownership. Meanwhile the unappropriated public lands suitable for grazing herds of cattle should be equally free to the enterprise of all citizens unembarrassed by attempts at exclusive occupation." And he recommended the enactment of a statute imposing penalties for the unlawful inclosure of public lands and preventing by force or intimidation legal settlement and entry. And, on April 5, 1883, the commissioner, in a circular letter to registers and receivers of land offices and special agents, said: "The fencing of large bodies of public lands beyond that allowed by law is illegal, and against the right of others who desire to settle or graze their cattle on the inclosed tracts. Until settlement is made, there is no objection to grazing cattle or cutting hay on government land, provided the lands are left open to all alike." And the commissioner's annual report for that year again called attention to the necessity for national legislation to prevent the unlawful exclusive occupation of the public domain.

One of the earliest decisions, if not indeed the first, respecting the right of the government to enjoin the maintenance of fences unlawfully inclosing parts of the public domain, was



delivered by Judge Sener, then chief justice of Wyoming territory, while presiding in the district court of Laramie county in 1883, in the hearing of the case of *United States v. Swan et al.* Among other things, the learned judge said in explaining the result of the inclosure there complained of: "But it is an inclosure of that which belongs to, or ought to be left free, to the public, so that all the public may go thereon until someone lawfully segregates it and makes it his own." In that case it was held that injunction would lie at the suit of the government to restrain the maintenance of the unlawful inclosure.

<sup>285</sup> Finally, by an act of February 25, 1885, Congress expressly prohibited the inclosing of public land by anyone without claim or color of title made or acquired in good faith with a view to entry thereof at the proper land office under the general land laws of the United States; and also prohibited the assertion of a right to the exclusive use and occupancy of any part of the public lands without claim, color of title, or asserted right as above specified as to inclosure. And penalties were provided to be imposed upon those violating the provisions of the act: 23 Stats. at Large, 321, 6 Fed. Stats. Ann. 533-536; 2 U. S. Comp. Stats. 1524.

The second amended petition averred threats and a purpose on the part of the defendants to go upon the range in question and usurp the same to their exclusive use, and to drive the cattle and horses of the plaintiff therefrom. But those allegations are not at all sustained by the evidence. There is absolutely no evidence of any act or threatened act on the part of the defendants, in respect to the public lands, than that of taking their several bands of sheep upon such lands in the usual manner of herding sheep and allowing them to graze there. There is some testimony to the effect that cattle will not voluntarily remain upon the same range with sheep, and that after the plaintiffs in error here had taken their sheep upon a part of the range, subsequent to the commencement of the suit, the cattle of plaintiffs moved to other neighboring lands; though that was more particularly the result, as we understand, of the fact that the sheep so taken on the range and completely depastured that part of it covered by their grazing. There is also testimony showing that sheep herders and their dogs often drive cattle away from the immediate vicinity in which the sheep under their charge are feeding.

But there is an entire absence of testimony to show that the defendants, their agents or employes, either with or without dogs, drove or threatened to drive the cattle or horses of plaintiffs or others from the range in controversy, or any part thereof, or molested them in any manner or attempted <sup>286</sup> or threatened to do so. The finding on that point is not supported by the evidence.

It cannot be held, we think, that by merely grazing a herd or herds of sheep under the charge of a herder or herders upon vacant public lands, the owner usurps the exclusive use or possession thereof, in the sense at least in which exclusive use or possession of the public domain is declared or held unlawful or opposed to public policy. In the absence of statutory provision, or other governmental regulation to that effect, there is no authority for confining the privilege of grazing upon the public lands to animals running at large, and denying that privilege to sheep under the control of herders.

Upon any theory of the case, therefore, no ground is presented for equitable interference as to the use of the public lands by defendants; conceding that threats of driving or actual driving of another's cattle from the public range, or unlawfully molesting them, would furnish ground for injunction. The several tracts of private land, it will be remembered, are so widely separated that sheep or other livestock in charge of herders may easily be grazed upon the public lands without crossing or touching the land of any private owner. The fact that nearly the entire available water supply for the watering of stock was situated upon the private lands certainly constitutes no ground for requiring the defendants or other sheep or livestock owners to keep off the vacant public lands in the territory in question. It is not to be presumed that the defendants would trespass upon the private lands as a necessary consequence or incident of enjoying the privilege of grazing the public lands. At any rate the possibility of such trespass furnishes no proper ground for restraining the use of the public lands. If it did, then by merely leaving uninclosed a tract of private land containing a supply of water the owner might exclusively control a greater or less area of the public domain. But, as will appear when we come to the testimony, the plaintiffs in error here controlled <sup>287</sup> water facilities a few miles from the western portion of the range in question, and it was, therefore, not only possible for them

to graze upon the public lands on that range and return to their own lands to water their stock, but they did, in fact, do so.

Though the defendants in error are not entitled to exclude the plaintiffs in error from the public lands, nor to enjoin the grazing of their sheep thereon, the latter have no right to willfully and knowingly direct or drive their sheep upon the private lands, although they are uninclosed, and may contain the only available or most convenient water supply in a particular neighborhood.

The rule that actionable trespass is not committed when domestic animals which are lawfully permitted to run at large go upon and depasture uninclosed premises of a private owner does not obtain in the case of livestock under the control of a herder, or whose movements are directed by the owner or others. The owner of uninclosed lands is presumed to know that certain kinds of livestock are allowed by law and custom to run at large, and that such animals will likely wander upon his ground; and he is, therefore, held to assume the risks of such trespasses by the act of leaving his premises open and unprotected by a lawful fence. But one may not avoid liability for willfully driving cattle or sheep upon the premises of another, though uninclosed, knowing the same to belong to a private owner; and especially is that true when it is known that the land owner has forbidden such acts: *Cosgriff v. Miller*, 10 Wyo. 190, 98 Am. St. Rep. 977, 68 Pac. 206.

In view of the rule appertaining to animals roaming at large in a lawful manner, equity will not enjoin their owner or owners from allowing them to trespass upon or depasture uninclosed premises: *Martin v. Platte Valley Sheep Co.*, 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093. But there can be no doubt that in proper cases, where the other necessary elements of equity jurisdiction are present, injunction will lie to restrain a livestock owner from willfully and knowingly driving or turning <sup>288</sup> his stock upon the uninclosed premises of a private owner. In such cases, however, as in all other cases where injunctive relief is sought, it is necessary to show a reasonable probability of the commission of the wrongful act and a well-grounded apprehension of resulting injury.

Injunction is a strong and powerful remedy; for its violation parties may be punished as for contempt upon summary

proceedings. It should not, therefore, be granted merely to protect a right where no actual or threatened violation of this right appears. Mr. High says: "Nor will a court of equity lend its aid by injunction for the enforcement of right or the prevention of wrong in the abstract, and unconnected with any injury or damage to the person seeking relief": High on Injunctions, 3d ed., sec. 1. And again: "An injunction, being the strong arm of equity, should never be granted except in a clear case of irreparable injury, and with a full conviction on the part of the court of its urgent necessity. To justify the court in granting the relief, it must be reasonably satisfied that there is an actual intention on the part of defendant to do the act which it is sought to enjoin, or that there is probable ground for believing that, unless the relief is granted, the act will be done. And it is not a sufficient ground for interfering that, if there be no such intention on the part of defendant, the injunction can do no harm. Nor will the court interfere when the evidence shows that there is no probability of defendant doing the act which it is sought to restrain": High on Injunctions, sec. 22.

Mr. Pomeroy, in the late edition of his work on Equity Jurisprudence, states the doctrine with special reference to trespass, as follows: "In the subject of trespass, as elsewhere, the main function of an injunction is to preserve property from future injury. Courts will not, however, enjoin against a mere speculative or possible injury. Instead, a reasonable probability of the injury resulting must be shown. Hence, if defendant has neither done nor threatened any wrongful acts, and denies his intention to do the <sup>289</sup> acts against which an injunction is sought, it will be refused. On the other hand, if plaintiff shows that defendant has threatened to do acts of the kind which equity enjoins, that is enough to rest his case upon": 5 Pomeroy's Equity Jurisprudence, sec. 501.

It is hardly necessary, therefore, to suggest that the solitary facts that plaintiff owns a tract of uninclosed land, and the defendant a herd, or it may be herds, of sheep, which might possibly be driven upon plaintiff's land, are not enough to justify the interposition of equity through its "strong arm" to prevent such possible trespass. If that ground should be held sufficient, then every land owner might apply for an injunction to restrain every stock-grower in his more or less

extensive neighborhood from willfully turning his stock upon the former's uninclosed land, though there may have been no acts of the kind either committed or threatened.

It appears by the evidence in this case that the plaintiffs in error own lands on Powder river, a stream running in a northerly direction, about eight or ten miles west of the western boundary of the alleged range of the plaintiffs; that the open range of the west side of said river has been used by the plaintiffs in error and other sheep owners for the purpose of grazing their herds; and that the plaintiffs in error at least had also for a year or more embraced as grazing grounds the lands east of the river embraced within ranges 77 and 76, in the locality in question. It will be remembered that the petition alleged that the open country in those ranges had been abandoned to the defendants by the plaintiffs. It also appears by the evidence, the same being admitted by one or more of the witnesses for plaintiffs below, that these plaintiffs in error in 1901, apparently without objection, drove and grazed their sheep upon a part of the range claimed by the defendants in error, presumably the public lands, there being no statement or showing to the effect that they had at any time prior to the commencement of the suit gone upon any of the tracts owned by either of the plaintiffs.

<sup>290</sup> The evidence discloses that immediately before the commencement of this suit the plaintiffs in error, and the other defendants, were grazing their several bands of sheep on the east side of Powder river, and gradually working in the direction of the territory described in the petition; and that they had severally declared a purpose of going into that territory for the purpose of grazing their sheep upon the lands therein located. Nothing but general declarations of an intention to take their sheep into the territory, or on the range aforesaid, were shown. And those declarations were qualified as to time, the statements being that the sheep would be taken into the territory in question as soon as snow fell. No defendant was shown to have uttered any threat at any time to depasture or enter upon any private ground. It appears that upon nearly all the tracts of private lands signs had been posted forbidding trespass thereon, though, owing to the rolling character of the country, the sign on a particular tract might not be visible from every part thereof; and, further, that it was a matter of common knowledge in the neighbor-

hood that the watering facilities within the territory aforesaid were located on private grounds. Moreover, one of the plaintiffs in error testified that he knew the location of the private tracts and had instructed his employes not to go upon them.

To construe the declared intention of the defendants of going upon the range, which consisted so largely of public lands, as a threat to depasture or trespass upon the private lands is unreasonable. In this case we have a scope of country covering twenty townships, with but occasional and widely separated sections containing private land; and the latter is designated by signs, and many of them are well known because containing water holes or other facilities for watering stock. We are of the opinion that a statement of an intention to go into that country with sheep for grazing purposes cannot be construed as a threat to wrongfully take the sheep upon any part of the private lands. It is not to be presumed that the defendants intended to commit a <sup>291</sup> wrong. Having a right to go upon the greater part of the range, their expressed intention to go there must be taken as referring to such parts of the territory as it would be lawful for them to occupy. Upon the basis of previous threats, therefore, the evidence is clearly insufficient to justify an injunction restraining the plaintiffs in error from trespassing upon the private lands.

But it appears that the plaintiffs in error, notwithstanding the temporary restraining order, did, in fact, after the commencement of the suit, and some time in January, 1903, take several bands or herds of their sheep, each herd containing two thousand five hundred to three thousand head, into a part of the territory in question, and grazed them there for a period of six weeks at least; and that in March of the same year they took said sheep out of that territory, and, though the case was tried in 1904, there is nothing in the evidence to show that they returned to any part of that range, or threatened to return. During the period that they were on the range they grazed in a district about twelve or fourteen miles north and south, and ten or eleven miles east and west, in townships 46, 47 and 48, in ranges 74 and 75; the said six townships being located in the northwestern part of the plaintiffs' alleged range. It does not appear that they invaded any other part of the territory, which consisted, as above

stated, of twenty townships at least. In grazing their sheep, a herd would be kept in one locality while the pasturage was sufficient, and then move along. Hence, so far as the evidence discloses, no tract of land was entered more than once.

While there are some general statements in the testimony of two or three witnesses to the effect that the plaintiffs in error, on the occasion aforesaid, depastured the private lands within the district above mentioned, we think the evidence insufficient to show that more than two of the private tracts were entered upon. Witnesses testify to seeing a herd of sheep belonging to plaintiffs in error, while under the control of a herder, upon section 36, in township <sup>292</sup> 46, range 74, upon which tract there was no warning sign to indicate its private ownership; and the sheep remained some days upon that section and then were moved away. Another witness testified that he saw a herd of sheep upon another school section, but he was not asked to locate it, and did not do so. If the sheep had gone upon or depastured other tracts of private land, we think it could have been shown by testimony more satisfactory than the general statements found in the testimony.

But let it be conceded that the private lands embraced in the district grazed over were depastured by the sheep of plaintiffs in error. It would then appear that but a single trespass was committed upon such lands, without any threat of continuance, and without any showing of permanent injury. On the contrary, it is established that the plaintiffs in error thereupon left the range, and presumably did not return. Further than that, the private lands within the particular district so grazed over constitute but a fraction of all the private lands; and there is no showing that plaintiffs in error went upon any of the other lands or threatened to do so. It does not appear that after the commencement of the suit, or at any other time, they were within several miles of many of the tracts of private land; nor upon any tract of some of the individual owners. For instance, the evidence does not show that the sheep of plaintiffs in error were within the township embracing the lands of Frank Smith, one of the plaintiffs below. There is no allegation or showing of insolvency on the part of plaintiffs in error. Again, it appears that the latter own cattle which run at large upon the range in question, and there is no reason apparent for re-

quiring them to prevent such cattle from straying upon the uninclosed grounds of private owners, which we think the judgment attempts to do.

Upon the facts aforesaid we fail to perceive any sound reason for the perpetual injunction even as to the lands held by private ownership. Within the well-settled principles of equity jurisdiction in restraining trespass to realty, it seems to us that the showing made is clearly inadequate.

<sup>293</sup> There exists, however, another and, if possible, more vital objection to the judgment in respect to the private lands; and that is the misjoinder of the plaintiffs below. Had there been a good cause of action on the theory of the petition to restrain the defendants from entering upon the open range jointly occupied by the plaintiffs, irrespective of the ownership of the lands, it seems probable that the joinder of the plaintiffs might have been held proper. But when the relief sought is confined to the several widely separated tracts of land owned respectively by one or other of a few only of the plaintiffs, the case takes on quite a different aspect. We are aware that the rule allowing numerous separate claimants to join in equity against a single defendant, or a single plaintiff to sue several defendants, is broad and liberal. But there must be some sort of community of interest in something. Mr. Pomeroy says that the weight of authority is overwhelming permitting the exercise of jurisdiction in such cases, not only where there is a common title, or community of right or interest in the subject matter among the individuals joined, but where, without such common title, or community of right or interest in the subject matter, there is a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. And though generally in the cases so holding the community of interest in the questions at issue and in the kind of relief sought has originated from the fact that the separate claims of all the individuals composing the body joined arose by means of the same unauthorized, unlawful, or illegal act or proceeding, the learned author asserts that even that external feature of unity has not always existed, and is not deemed essential: Pomeroy's Equity Jurisprudence, 3d ed., sec. 269. It is unnecessary for us to decide whether the plaintiffs could



have properly joined to restrain trespasses by the same defendant upon different widely separated premises owned by them respectively within a more or less definite territory. <sup>294</sup> Here five only of the plaintiffs are alleged or shown to own any land, and, though there is an endeavor in the petition to show cause for the single suit as to the private property by alleging that certain of the plaintiffs, together with the owner, are jointly in possession, at least three of the plaintiffs are not connected with those allegations.

The evidence, however, fails, in our opinion, to show the joint possession alleged. It appears that such allegations are based solely upon the facts that the various individual plaintiffs allow their separately owned cattle and horses to run at large and range upon and over the same territory, that such animals are rounded up together, and that the respective owners of private lands on the range permit the stock of the other plaintiffs to feed and water at will upon their uninclosed premises. And it may be that there is an arrangement of some character in reference to the last-mentioned matter; but the evidence as to such an arrangement is most general and quite unsatisfactory, one witness merely responding in the affirmative when asked if there was an arrangement to that effect.

Those facts do not, in our opinion, show a joint possession by the plaintiffs of any individual tract of land owned by some one of the plaintiffs. We observe nothing in the evidence that would prevent any private owner from fencing in or otherwise exercising exclusive control of his own premises at any time if he should choose to do so. We do not think any other plaintiff could legally call him to account for such action upon any fact disclosed by the testimony in this case. We are not convinced that the mere fact that a land owner allows his premises to remain open and accessible to cattle roaming at large, while he offers no objection to the cattle of his neighbors going thereon to graze, or perhaps tacitly acquiesces in such trespass, has the legal effect to place the owner or owners of the roving cattle in joint possession of the premises with the owner. The land of at least two of the five private owners was not trespassed upon, nor were there any threats of trespass thereon. <sup>295</sup> It is not perceived how they are interested in a community sense in the settlement of the controversy growing out

of a trespass upon land of a different plaintiff or a threat to commit such trespass.

The question of misjoinder of plaintiffs was first raised by demurrer, which was overruled, and afterward by answer. Treating the case as one to enjoin trespass upon the private lands, we are satisfied that the plaintiffs were improperly joined.

There is an entire absence of testimony to show any actual or threatened pollution of the water upon any of the lands of any of the plaintiffs. The evidence is that the waters were not polluted. There is a conflict in the evidence as to whether a herd of sheep will pollute a watering place, if allowed to water there. But as there had been no threats on the part of plaintiffs in error to water their sheep on the land of plaintiffs, and no satisfactory proof that they did so, and they having departed from the vicinity of such lands and watering places in March, 1903, it is not material, we think, what may be the usual effect upon a body of water of allowing sheep to drink there.

The judgment will be reversed and vacated, and the cause remanded to the district court to enter judgment in favor of the plaintiffs in error for costs, and dissolving the temporary restraining order.

Beard, J., and Van Orsdel, J., concur.

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*The Liability of Owners of Livestock Herded* or permitted to range on the uninclosed lands of another is discussed in the note to *Moore v. Cannon*, 81 Am. St. Rep. 446. There seems to be no doubt that one who drives his stock, intentionally and persistently, upon the uninclosed land of another commits a trespass for which he is liable: *Cosgriff Bros. v. Miller*, 10 Wyo. 190, 98 Am. St. Rep. 977.

*An Injunction will lie* against continued and repeated acts of trespass in turning sheep and cattle upon uninclosed land to the destruction of the grass thereon: See the note to *Moore v. Halliday*, 99 Am. St. Rep. 751.

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land for her, and a decree was entered giving a part thereof to her and the remainder to her husband, whereupon execution was issued upon a judgment against him, and at a sale thereunder plaintiff's attorneys purchased such land, they will not be allowed to retain it, for by such purchase they acquired no rights against their client. (Mo.) *Bucher v. Hohl*, 492.

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### BILLS AND NOTES.

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*Notice to Holder of Check.*

**5. BILLS AND NOTES—Checks—Notice to Payee.**—A person who is dealing with a tax collector personally and accepts his check signed "John A. Perkins, T. C.," is bound to know that "T. C." stands for tax collector, and that he has accepted the officer's check upon his trust fund held for the state. (La.) *State v. Jahraus*, 208.

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2. **BOUNDARIES—Streets—"Corner of Lots."**—In a deed of a lot in a recorded plat described by metes and bounds, the words "the northwest corner of" the lot mean the intersection of the south and east lines respectively of the two streets at the corner of the lot and not the point at the intersection of the center lines of such streets. (Wis.) *Wegge v. Medler*, 953.

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**BRIBERY.**

1. **BRIBERY—Unsuccessful Soliciting** by a public officer of a bribe to influence his official action is a crime under a statute providing that any person who shall advise the commission of, or attempt to commit, any felony that shall fail in being committed, shall be punished as prescribed. (Wis.) *Rudolph v. State*, 32.

2. **BRIBERY—Soliciting Bribe.**—If when a city council is just about to pass upon a claim, a member of the council asks the claimant for a sum of money as a condition for voting for the allowance of the claim, and also asks the claimant to pay the same and an additional sum to the other members of the council, offering to secure favorable action on the claim if such sums were paid, such acts are overt and done in the furtherance of a criminal design and will sustain a conviction for an attempt to commit a felony. (Wis.) *Rudolph v. State*, 32.

3. **BRIBERY—Solicitation of Bribe.**—Testimony of a member of a city council before the grand jury that he knew of no bribery or crookedness in public affairs does not entitle him to immunity from prosecution for soliciting a bribe while such councilman. (Wis.) *Rudolph v. State*, 32.

4. **BRIBERY—Solicitation of Bribe.**—Evidence given by a city councilman before a grand jury that he was at a certain time a city councilman does not expose him to the danger of a prosecution for a crime not bring him within the constitutional privilege as to self-incrimination, nor make him immune from prosecution for soliciting a bribe while such councilman. (Wis.) *Rudolph v. State*, 32.

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### BUILDING AND LOAN ASSOCIATIONS.

**BUILDING AND LOAN ASSOCIATIONS—Usury.**—If the members of a building and loan association are notified by its officers that they will be required to pay six per cent per annum premium on all loans in addition to legal interest, and they accordingly make written application for loans on such terms, giving a power of attorney to an officer of the association to submit their bid, and the board of directors of such association pass upon such applications, according to their priority without any bidding or competition, they act in violation of law, and a member is entitled to set off against the principal of his loan all premiums paid in excess of legal interest. (Pa.) *Klein v. Pennsylvania Sav. etc. Assn.*, 784.

### BURGLARY.

1. **BURGLARY—Chicken-house.**—The breaking and entering a chicken-house is burglary within the meaning of a statute defining that crime to be "the unlawful entering of a house, tenement, railroad car or other building, boat, vessel or water craft, in the nighttime, with intent to commit a felony. (Ark.) *Gunter v. State*, 85.

2. **BURGLARY—Sufficiency of Proof.**—Proof that chickens were taken from a chicken coop does not sustain a charge of burglary in breaking and entering a chicken-house. (Ark.) *Gunter v. State*, 85.

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## CARRIERS.

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2. **CARRIERS OF PASSENGERS, Liability of to Persons Riding on a Ticket Obtained at Reduced Rates by Misrepresentation.**—One who obtains a ticket at reduced rates by falsely representing herself to be under eighteen years of age and to be a pupil in an art school, and who, by virtue of such ticket, goes upon a railway train, is a mere trespasser, and is barred by her false conduct from recovering for injuries sustained by her, and for which she would have a right to recover if a passenger. (Mass.) *Fitzmaurice v. New York etc. R. R. Co.*, 236.

3. **CARRIERS OF PASSENGERS, Effect of Accepting Coupons on Ticket Obtained by Misrepresentation.**—If one obtains a ticket at a reduced rate by knowingly and falsely representing herself to belong to a class entitled to tickets at such rate, the acceptance of coupons on such ticket by conductors who do not know the circumstances under which it was obtained should not establish acquiescence in the wrongful purchase, nor entitle the holder of the ticket to recover for injuries sustained on the train under circumstances which would entitle a passenger to recover. (Mass.) *Fitzmaurice v. New York etc. R. R. Co.*, 236.

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5. **CARRIERS—Passenger Projecting Arm from Window.**—It is negligence per se for a passenger on a rapidly moving steam or interurban electric car to unnecessarily and heedlessly project his arm out of the window. (Ohio St.) *Interurban Ry. etc. Co. v. Hancock*, 710.

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7. **RAILWAYS, Liability of for Negligence of Conductor in Assisting a Passenger to Alight.**—Though a railway company is under no obligation to supply servants to assist a passenger in descending from a car, yet if its conductor undertakes to do so, the passenger has a right to rely on his careful performance of his undertaking and may recover of the railway for injuries suffered by the conductor's failure to use reasonable care, as where he, suddenly withdrawing his support causes the passenger to fall. (N. Y.) *Hanlon v. Central R. R. Co.*, 591.

### *Of Goods.*

8. **CARRIERS—Delivery—Title to Goods.**—If a vendor undertakes to make delivery by carrier to a distant place, the carrier

becomes the agent of the vendor, and the property and the title thereto, do not pass until actual delivery. (Ark.) *Templeton v. Equitable Mfg. Co.*, 88.

9. **CARRIERS—Delivery—Title to Goods.**—If goods shipped are to be delivered to a carrier specially designated by the vendee, the carrier becomes the agent of the vendee, and delivery to it is delivery to him, and passes the title. (Ark.) *Templeton v. Equitable Mfg. Co.*, 88.

10. **CARRIERS—Delivery—Title to Goods.**—If a contract for the carriage of goods is silent as to the mode of delivery, delivery by a vendor to a carrier in the usual and ordinary course of business constitutes delivery of the vendee, and passes the title. (Ark.) *Templeton v. Equitable Mfg. Co.*, 88.

11. **CARRIERS—Delivery—Title to Goods—Rescission.**—If an order for goods directs the vendor to deliver them to a carrier either at a distributing point or at the factory of the vendor, and such goods are delivered at the factory in due course of business and in apt time to a railroad company properly consigned to the vendee, the title passes to him at that time, and a subsequent delay of the carrier in transporting the goods constitutes no ground for a rescission of the contract of purchase. (Ark.) *Templeton v. Equitable Mfg. Co.*, 88.

12. **CARRIERS—Nondelivery of Bill of Lading—Title to Goods.**—If goods are shipped by carrier consigned to the vendee and the bill of lading is not negotiated, the title to the goods passes to the vendee or delivery to the carrier, though the bill of lading is not sent to him. (Ark.) *Templeton v. Equitable Mfg. Co.*, 88.

13. **CARRIERS—Liability for Freight.**—A carrier's liability begins when it receives freight for immediate shipment, and is not dependent upon the issuance of a bill of lading. (Ark.) *Garner v. St. Louis etc. Ry. Co.*, 83.

14. **CARRIERS—Title to Goods Shipped—Recovery for Loss.**—If, in the usual course of dealing, goods are delivered to a carrier to be delivered to the consignee, and the carrier then delivers a bill of lading which is then delivered either directly to the consignee or with a draft attached to a bank, when in due commercial course it would reach the consignee, the mere delivery of the goods to the carrier with shipping directions does not pass the title to the consignee, and in case of their loss before delivery the consignor is entitled to recover their value. (Ark.) *Garner v. St. Louis etc. Ry. Co.*, 83.

15. **CARRIERS—Contract Limiting Time for Presentation of Claims.**—An agreement between a carrier and a shipper that the shipper must present a verified claim for any loss or damage within a specified time, else the carrier will not be liable therefor, is valid if the time limited is, under the circumstances of the case, a reasonable one. (Ohio St.) *Pennsylvania Co. v. Shearer*, 730.

See Railroads; Street Railways.

Note.

**Cemeteries**, ejectment to recover burial lots in, 578, 579.

#### CERTIFIED CHECKS.

See Bills and Notes 3, 4.

**CHECKS.**

See Bills and Notes.

**CONDITION PRECEDENT.**

**EVIDENCE, PAROL, to Prove Condition Precedent.**—Parol evidence is admissible to show that a written contract not under seal was not to become binding until the performance of some condition precedent, although the contract names other conditions precedent, not repugnant to the one sought to be shown, to its becoming operative and taking effect. (Wis.) *Golden v. Meier*, 935.

**CONSTABLES.**

See Sheriffs and Constables.

**CONSTITUTIONAL LAW.***Regulation of Occupation.*

1. **CONSTITUTIONAL LAW—Police Power—Right to Engage in Business or Work.**—The right of the citizen to follow any legitimate business, calling or occupation which he may see fit to engage in, and to use such right as a means of livelihood, is subject to the paramount right of the state to impose upon the enjoyment thereof any reasonable regulation the public welfare may require. (Ill.) *Douglas v. People*, 162.

2. **CONSTITUTIONAL LAW—Regulation of Plumbers.**—The state may impose any restraint and prescribe any requirement it may deem proper for the protection of the public against the evils resulting from the incapacity and ignorance of persons engaged in the plumbing business, as master plumbers, employes of plumbers, or journeymen plumbers. (Ill.) *Douglas v. People*, 162.

3. **CONSTITUTIONAL LAW—Classification by Population.**—A classification of cities, towns and villages by population, as a basis of legislation, may be properly made if based upon a rational difference of situation or condition found in the municipalities placed in the different classes. (Ill.) *Douglas v. People*, 162.

4. **CONSTITUTIONAL LAW—Regulation of Plumbers—Classification by Population.**—A statute providing that all plumbers in cities, towns and villages of five thousand inhabitants or more shall obtain certificates, and requiring cities, towns and villages of ten thousand inhabitants or more to appoint and maintain a board of examiners to inquire into the qualifications of plumbers and to issue certificates thereto, is not unconstitutional as to the classification of such cities, towns and villages by population. (Ill.) *Douglas v. People*, 162.

5. **CONSTITUTIONAL LAW—General Laws.**—A law is general and uniform if it operates alike upon every person in the state who is brought within the conditions and circumstances prescribed by the law. (Ill.) *Douglas v. People*, 162.

6. **CONSTITUTIONAL LAW—Regulation of Plumbers.**—A statute providing that plumbers in cities of five thousand inhabitants or more shall obtain qualification certificates, and requiring cities of ten thousand inhabitants or more to appoint and maintain a board of examiners to inquire into the qualifications of plumbers and issue certificates thereto when qualified, is a valid exercise of the state police power, is valid as a general law, and does not confer arbitrary

powers upon such board of examiners. (Ill.) *Douglas v. People*, 162.

*Regulation of Sales of Goods.*

7. **CONSTITUTIONAL LAW—Sales of Merchandise in Bulk.**—A statute making void as to creditors a sale of a stock of merchandise in bulk in certain cases and applying to residents and nonresidents alike is not unconstitutional as depriving a person of his property without due process of law, or as being class legislation in operating against merchants alone, nor because it does not include within its terms sales by merchants who owe no debts. (Mich.) *Spurr v. Travis*, 330.

8. **CONSTITUTIONAL LAW—Police Power—Right to Sell Property.**—If, in the exercise of the police power, a beneficial result is sought, and legislation is enacted in the protection of rights which would, but for the enactment, be subject to defeat, such legislation does not infringe the liberty of the citizen in a legal sense, or deprive him of property because it involves regulations which may postpone for a reasonable time the exercise of his right to sell his property. (Mich.) *Spurr v. Travis*, 330.

9. **CONSTITUTIONAL LAW—Sales of Merchandise in Bulk—Police Power.**—A statute making void as to creditors a sale of a stock of merchandise in bulk in certain cases, and including regulations which may postpone for a reasonable time the exercise of the right of the indebted merchant to sell his stock of goods in bulk, is a valid exercise of the police power, and is not an unconstitutional invasion of personal liberty or of property rights. (Mich.) *Spurr v. Travis*, 330.

See Process.

Note.

**Constitutional Law**, libel, statutes undertaking to limit the right or the amount of recovery for, 803.

**CONTINUANCE.**

**TRIAL—Continuance—Absence of Witnesses.**—A motion for a continuance on the ground of the absence of witnesses is properly denied, where the applicant does not show that he has communicated, or attempted to communicate, with them, nor made any effort to procure their attendance except to procure a subpoena, and states no acts tending to show that there is any probability that they will be present at the next term of court, or that their testimony can be procured within a reasonable time. (Utah) *State v. Freshwater*, 53.

**CONTRACTS.**

*General.*

1. **CONTRACT.**—A Judgment is not a Contract in any proper sense of the term. (Minn.) *Olson v. Dahl*, 435.

2. **CONTRACT to Paint Portrait—Breach of Trust.**—If a person, after filling an order to paint a portrait from photographs furnished by his patron to aid him in his work, and after being paid therefor, proceeds, without authority, to paint another portrait from the same photographs, which he places in the possession of his patron for his inspection, and which is retained by him, the artist cannot compel his patron to pay for the last portrait. The act of painting it constitutes a violation of contract and a breach of trust. (Wis.) *King Sheriffs*, 967.

**3. CONTRACTS—Pleading—Variance.**—Proof of a contract by ratification of an agent's act is not a variance from the theory of a complaint, seeking recovery as on a direct contract. (Wis.) *Shuman v. Steinel*, 961.

*Validity—Public Policy.*

**4. CONTRACT—When Against Public Policy—Burden of Proof.**—The party who asserts that a contract is against public policy has the burden of proving the same. (Minn.) *James Quirk Milling Co. v. Minneapolis etc. R. R. Co.*, 336.

**5. CONTRACT—Exemption from Liability for Negligence.**—The rule which forbids a person to protect himself by contract against damages resulting from his own negligence applies only when the contract protects him against the consequences of a breach of some duty imposed by law. (Minn.) *James Quirk Milling Co. v. Minneapolis etc. R. R. Co.*, 336.

**6. CONTRACT—Exemption of Railroad from Liability for Fire.**—Where a railroad company grants a privilege to erect a grain elevator on its right of way, a condition in the contract that it shall not be liable to the elevator company for damages caused by fires resulting from the operation of its engines is not against public policy, and is therefore binding on the parties. (Minn.) *James Quirk Milling Co. v. Minneapolis etc. R. R. Co.*, 336.

## CONVERSION.

**REAL ESTATE—Conversion of Proceeds of into Personality.**—The proceeds of realty originally held in a trust fund, but sold and changed into personal property by the trustees, under a power given them by a will authorizing them to sell to change investments, retain their original character of real property and must be so treated in distributing the trust fund. (Mass.) *Gray v. Whittemore*, 246.

## CORPORATIONS.

*In General.*

**1. CORPORATIONS—Notice of Meetings.**—Although it is well settled that corporate acts required to be done or authorized by corporation directors must be at a meeting at which all are present or have an opportunity to be present, this rule is for the benefit of the shareholders, and acts done by three of the directors thereof at a time and meeting when a fourth director is absent and not notified are binding when such fourth director is a shareholder and director in name only. (Ark.) *Stiewel v. Webb Press Co.*, 62.

**2. CORPORATIONS—Enforcement of Contract—Equity.**—If a corporation accepts and retains the benefit of a contract which calls for the execution of a mortgage and notes, which, when executed in pursuance of the contract, are void for informality, a court of equity will require the corporation to execute the mortgage and notes in a proper and legal form. (Ark.) *Stiewel v. Webb Press Co.*, 62.

**3. JUDGMENT Against Insolvent Corporation When Binding Upon Stockholders Though Entered in a State of Which They are not Residents.**—A decree entered in another state against a corporation, appointing a receiver therefor and finding that such corporation was insolvent and without property, and adjudicating and putting in

judgment against it claims of specified amounts, and authorizing such receiver to bring suits against the stockholders, there being no contention that the court did not have jurisdiction of the subject matter of the suit and of the parties thereto, including such corporation, is conclusive on its stockholders when suit is brought to enforce their liability in another state respecting their liability. Persons becoming stockholders of a corporation are bound by the provisions of the statute of the state wherein the corporation was formed existing at the time of the acquisition of their shares, and who must be regarded as within the jurisdiction of the local courts of the state, so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. (Mass.) *Francis v. Hazelett*, 230.

4. **CORPORATIONS, Jurisdiction of Court in Proceedings Against Depends on Its Finding and cannot be Overthrown by Disproving Such Finding.**—In proceedings in a state court against a corporation, a finding that the assets of such corporation are wholly exhausted is conclusive in favor of the jurisdiction of such court, and a decree dependent on such finding cannot be avoided on the ground that assets in fact existed. (Mass.) *Francis v. Hazlett*, 230.

*Foreign Companies.*

See Limitation of Actions, 2; Taxation, 2-4.

5. **CORPORATIONS, FOREIGN—Conditions Precedent to Doing Business within the State.**—A state has the right in consenting to allow foreign corporations to carry on business within her borders to attach any kind of conditions to such consent. (La.) *Metropolitan Life Ins. Co. v. Board of Assessors*, 179.

6. **CORPORATIONS, FOREIGN—Compliance with State Laws.**—A foreign corporation coming into the state for business purposes is constructively present therein, and voluntarily places itself within the jurisdiction of the state, and accepts and subjects itself to the laws thereof. (La.) *Metropolitan Life Ins. Co. v. Board of Assessors*, 179.

7. **CONTRACTS—Foreign Corporation—Statutory Construction.**—A statute providing that contracts of a foreign corporation, which has not complied with the requirements of the statute, shall be wholly void on its behalf, must be enforced according to the words. (Wis.) *Allen v. City of Milwaukee*, 54.

See Gas Companies.

#### COTENANCY.

See Tenancy in Common.

#### COUNTERCLAIM.

See Setoff and Counterclaim.

#### COURTS.

**JURISDICTION—Supreme Court—Validity of Ordinance.**—The state supreme court has jurisdiction of a direct appeal involving the validity of a municipal ordinance, when the determination of such validity involves a construction of the state constitution. (Ill.) *People v. Clean Street Co.*, 156.

**CRIMINAL LAW.**

**1. PUBLIC TRIAL—What Amounts to Denial of Right to.**—An order of the court in the course of a felony trial that, in view of the immoral or obscene testimony likely to be given by the witnesses next to be called, the court will continue the trial, during their examination, in a small courtroom in which the sheriff shall admit no one except the jury, defendant's counsel, members of the bar, newspaper men, and one other person, a witness for the defendant, exceeds the power of the court, and its enforcement denies the accused his constitutional right to a public trial. (Ohio St.) *State v. Hensley*, 734.

**2. PUBLIC TRIAL—Waiver of Right to.**—The constitutional right of a person charged with a felony to a public trial cannot be waived by silence any more than can his right to a jury trial (Ohio St.) *State v. Hensley*, 734.

**DANGEROUS PREMISES.**

See Negligence, 4.

**DEATH.**

**TREATIES—Rights of Nonresident Aliens Under.**—Under treaty provisions between the United States and Italy stipulating that citizens of the latter country while in the United States shall enjoy, in the protection and security of their persons and property, the same rights which the citizens of the United States enjoy, a nonresident alien who is a citizen of Italy cannot maintain an action in the United States for recovery of damages for injury causing the death of another citizen of Italy while in the United States (Pa.) *Maiorano v. Baltimore etc. R. R. Co.*, 778.

**DEEDS.**

**DEEDS—Quitclaim—Effect.**—A quitclaim deed is not an assertion of any particular, or of any, title, and does not of itself operate as an estoppel against either the grantor or grantee as to the nature or extent of the title. (Mich.) *Almstead v. Tracy*, 299.

Note.

Definition of bribery, 38.

of due and of reasonable care, 109.

of extortion, 448, 466.

**DESCENT AND DISTRIBUTION.**

**CONSTITUTIONAL LAW—Heirs at Law, Power of the Legislature to Change the Rule Designating.**—Heirs at law do not, prior to the death of the ancestor or other person under whom they claim, have any vested right to the continuance of their heirship, but the legislature has the power to provide for a different line of inheritance (N. Y.) *Gilliam v. Guaranty Trust Co.*, 536.

**DISMISSAL AND NONSUIT.**

**TRIAL—Nonsuit—Weighing Evidence.**—On a motion for a nonsuit the court cannot weigh the evidence, but must consider it in the



most favorable light for the plaintiff. (Utah) *Tuckett v. American Steam and Hand Laundry*, 832.

**DIVORCE.**

1. **DIVORCE, Impotency, When may Coexist With the Possibility of Sexual Intercourse.**—A husband is entitled to a divorce from his wife on the ground of her impotency, though they have had complete sexual intercourse on more than one occasion, if, owing to peculiarities in the sexual organs of each, such intercourse always was, and always must be, attended with pain on her part so severe that they, on the advice of a physician, separated and have since lived apart, though such peculiarities would not interpose any difficulty in either having such intercourse with any other person of the opposite sex. (Mass.) *S—— v. S——*, 240.

2. **TENANCY BY ENTIRETIES—Effect of Divorce.**—If a husband and wife hold an estate as tenants by entireties, and are subsequently divorced, the divorce does not change the tenancy into a tenancy in common. (Pa.) *Alles v. Lyon*, 791.

3. **TENANCY BY ENTIRETIES.**—An estate by entireties is one held by husband and wife by virtue of title acquired by them jointly after marriage, and as they are regarded in law as one person, they do not take in parts or shares, like joint tenants or tenants in common, but each takes the whole. Incident to this estate as to joint tenancy is the right of survivorship, with this difference, that on the death of the husband or wife the survivor takes no new title or estate, as he or she is in possession of the whole from its inception. (Pa.) *Alles v. Lyon*, 791.

4. **TENANCY BY ENTIRETIES—Divorce—Ejectment.**—If a husband and wife holding an estate by entireties are divorced, she is not entitled to bring an action of ejectment against her divorced husband, and his failure to appear and answer is immaterial. (Pa.) *Alles v. Lyon*, 791.

**Note.**

**Divorce, grounds for in the United States are statutory**, 242.

impotence, age of parties, when and whether material, 246.

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impotence, curable, as ground for, 243.

impotence, curable, refusal to submit to treatment, 243.

impotence does not make marriage void, 241.

impotence, examination of the person to prove or disprove, 245, 246.

impotence, evidence of, 245.

impotence is not a ground for unless so declared by statute, 242.

impotence, how long must continue after marriage, 242.

impotence may exist in one having power to copulate with all persons other than his or her spouse, 245.

impotence, power of copulation, when does not disprove, 244.

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impotence, want of power to beget or conceive does not establish, 244.

impotence, what constitutes. 243.

**DOGS.**

See *Street Railways*, 2.

**DOWER.**

1. **DOWER cannot Exist in an Estate of Which the Husband in His Lifetime had No Present Estate or Inheritance.** (Mass.) Gray v. Whittemore, 246.

2. **DOWER in Equitable Estate.**—If, under a deed, land is granted to a trustee for the use and benefit of the grantor to collect the rents, issues and profits and to pay the amount remaining thereof after payment of taxes, cost of insurance and repairs, to such grantor as demanded during his lifetime, reserving him the absolute power of disposition of the land in fee, with direction to the trustee to convey the land to such person as the grantor may name, and upon the death of such grantor to convey the residue, if any, to the children of such grantor or their decedents, and upon consideration of the whole deed it appears that the intention was to reserve to the grantor the absolute power of disposition in fee simple, he, after making such deed, remains at least the owner of an equitable estate in fee simple of the land, and his widow is entitled to dower therein, provided he was the owner of such title during coverture. (W. Va.) Meyer v. Barnett, 894.

**DURESS.**

**DURESS Exists Where One Party, by the unlawful act of another, has been induced to make a contract or perform some other act under circumstances depriving him of the exercise of his free will and by fear of imminent injury to his person or property.** (Wis.) Hodge v. Wallace, 938.

**EASEMENTS.**

See Private Ways.

**EJECTMENT.**

1. **EJECTMENT.**—Though Ouster is Essential to an Action of Ejectment It Need not be Entire or Absolute, for it is sufficient if defendant is in partial possession of the premises while plaintiff is in possession of the remainder. (N. Y.) Butler v. Frontier Tel. Co., 563.

2. **EJECTMENT When Maintainable.**—The Ability of the Sheriff to Deliver Possession is a Test of the right to maintain ejectment. (N. Y.) Butler v. Frontier Tel. Co., 563.

3. **EJECTMENT for the Maintenance of a Telephone Wire.**—Ejectment can be maintained against one who strings, a few feet above the surface of the soil, a telephone wire and there maintains it without the consent of the owner. (N. Y.) Butler v. Frontier Tel. Co., 563.

4. **EJECTMENT—Costs.**—If a sale of the common grantor of the parties is brought into an ejectment suit as a party, and successfully defends by separate attorney, he is entitled to recover full costs and disbursements. (Wis.) Wegge v. Madler, 953.

Note.

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- for intrusion by projecting eaves, cornices, and the like, 582, 583.
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- property for which not maintainable, 572.
- tests of right to maintain, 573, 581.

**ELECTRICITY.**

1. **ELECTRICITY—Duty of Persons Using—Negligence.**—If a wire has been attached to a tree as a brace and fastened at the other end to a guy post in such manner as to be in contact with the guy wire of an electric light pole, and thus becomes charged with electricity escaping through a defective insulator from an electric lamp to the span wire and thence to such guy wire, whereby a person is killed by coming in contact with the tree wire, the electrical company is liable therefor, provided such defective conditions had existed for such a length of time that the company ought to have discovered and remedied them before the accident. In such case the existence of the tree wire is not such an extraordinary condition as not to have been reasonably apprehended in the conduct of the company's business. (Wis.) *Wilbert v. Sheboygan etc. Ry. Co.*, 931.

2. **ELECTRICITY—Duty of Persons Handling.**—The danger incident to the use of electricity is imminent and lurking in character, and a high degree of watchfulness for the prevention of accidents is imposed on persons handling it, and the watchfulness needed to prevent accidents should take into account the acts of strangers and the public generally. (Wis.) *Wilbert v. Sheboygan etc. Ry. Co.*, 931.

**EMINENT DOMAIN.**

1. **EMINENT DOMAIN—Right to Notice and Hearing.**—The owner of property taken from him by virtue of the right of eminent

domain is entitled to notice and an opportunity to be heard upon the question of the amount of his compensation. (Wyo.) *Sterritt v. Young*, 994.

2. **CONSTITUTIONAL LAW—Eminent Domain—Right to Notice and Hearing.**—A statute authorizing the taking of private property under the right of eminent domain must, to be valid, provide for notice to the land owner, and he must be given an opportunity to be heard as to the amount of his damages. (Wyo.) *Sterritt v. Young*, 994.

3. **CONSTITUTIONAL LAW—Eminent Domain—Right to Notice.**—A statute authorizing the taking of private property under the right of eminent domain, to be valid, must provide for notice to the land owner of the time and place of the meeting of the appraisers appointed to determine the amount of damages, and if no such notice is provided for, it cannot be implied by the court. (Wyo.) *Sterritt v. Young*, 994.

4. **EMINENT DOMAIN—Nature of Proceeding.**—A proceeding to condemn property under the right of eminent domain is not a civil action, nor is it necessary that it should be considered in the ordinary course of legal proceedings. The appointment of appraisers may be confided to any fair tribunal, board or officer and still be due process of law, provided the land owner shall have notice and an opportunity to be heard and he has a right to show, if he can, that no such case has been made out as will authorize the proceeding. (Wyo.) *Sterritt v. Young*, 994.

5. **EMINENT DOMAIN—Effect of Payment and Acceptance of Award of Damages.**—If commissioners appointed to assess a land owner's damages arising from the appropriation of a right of way through his land have fixed the amount and the railroad company excepts to such award, but subsequently pays the amount into court and takes possession of the right of way, and the land owner accepts the amount of the award in money, the railroad company is not thereby estopped to further litigate with such land owner the amount of the damages. (Mo.) *St. Louis etc. R. R. Co. v. Aubuchon*, 499.

6. **EMINENT DOMAIN—Independent Tracts.**—If there are two or more independent farms held by separate chains of title, that have been subjected to an independent and distinctly separate use, in condemning a strip of land off of one of them under the right of eminent domain, the other farm or farms, though belonging to the same owner, are not to be considered in estimating damages. (Mo.) *St. Louis etc. R. R. Co. v. Aubuchon*, 499.

#### **EMPLOYER'S LIABILITY.**

See Master and Servant.

#### **ENTIRETIES.**

See Divorce, 2-4; Husband and Wife, 6.

#### **EQUITY.**

1. **EQUITY—Jurisdiction for One Purpose, Extending to Others.**—It is not an infallible rule that equity, having taken jurisdiction for one purpose, will dispose of all matters in the case, though some be

of legal cognizance. (W. Va.) Deepwater Ry. Co. v. D. H. Motter & Co., 873.

2. **EQUITY—Jurisdiction—Retention of.**—If the remedy at law is more appropriate than the remedy in equity, or the verdict of a jury is indispensable to the relief sought, equity, though having entertained jurisdiction for one purpose, the jurisdiction will be declined, or if retained will be so subject to a trial at law, and the facts of each case must determine as to this. (W. Va.) Deepwater Ry. Co. v. D. H. Motter & Co., 873.

3. **EQUITY PRACTICE, Cross-bill, When not Sustainable.**—In a suit by the stockholders of a foreign corporation against its receiver appointed in another state to restrain him from prosecuting actions at law against complainants to enforce their liability as stockholders, the defendant cannot by cross-bill enforce the liability of the plaintiffs, where he has already commenced suits at law to enforce such liability, and the remedy at law to which he thus resorted does not appear to be inadequate. (Mass.) Francis v. Hazlett, 230.

4. **LACHES—Stale Claims—Equity.**—The defense that a claim is stale is purely an equitable one, and unless there is some natural justice back of it a court of equity will not entertain it. (Mo.) Bucher v. Hohl, 492.

Note.

**Equity Jurisdiction, estates of decedents, extent of over when jurisdiction rests upon some special ground, 881.**

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where the exercise of it is merely ancillary to a legal remedy, 881.

## ESTOPPEL.

See State 1.

## EVIDENCE.

*in General.*

1. **EVIDENCE—Exercise of Due Care.**—Due care may be shown by circumstances as well as by direct testimony, and the fact that the deceased, at the time of the accident, was not guilty of negligence, may be shown by her habits and by what are known to be the instincts of self-preservation in persons possessed of their natural faculties and who are ordinarily sober, and careful of their personal safety. (Ill.) Chicago etc. Ry. Co. v. Wilson, 102.

2. **EVIDENCE—Proof of Kinship.**—The evidence of a witness whose knowledge has been derived from an intimate acquaintance with a family is admissible as to such facts of family history as marriage, kinship, name and death. (Minn.) Hoyt v. Lightbody, 358.

3. **EVIDENCE of Similar Act.**—The commission of the act charged against a person cannot be proved by showing a like previous

**Extortion, effect of guilt of person threatened, 474.**  
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#### FALSE IMPRISONMENT.

**1. FALSE IMPRISONMENT—Unlawful Arrest.**—If policemen go to a man's house and in some manner succeed in getting him to accompany them to the office of the chief of police, who searches him and then has him incarcerated in prison, such officers may be held liable for an unlawful arrest and false imprisonment if such arrest is made without cause. (Pa.) *McAleer v. Good*, 782.

**2. FALSE IMPRISONMENT—Unlawful Arrest.**—If an arrest of one person without cause is made at the instance of another with his knowledge and consent, he is liable for the unlawful arrest and false imprisonment, although he may not have expressly directed the officer to make the arrest. (Pa.) *McAleer v. Good*, 782.

**3. FALSE IMPRISONMENT—Burden of Proof.**—In an action for unlawful arrest and false imprisonment the burden of proof is upon the defendant to show that the arrest was made by authority of law. (Pa.) *McAleer v. Good*, 782.

**4. FALSE IMPRISONMENT—Unlawful Arrest—Defenses.**—Constables and other officers who arrest persons suspected of having committed felony, in actions for damages therefor, should be allowed to defend upon like principles as a private person who causes an arrest by a complaint on oath. (Pa.) *McAleer v. Good*, 782.

**5. FALSE IMPRISONMENT—Unlawful Arrest—Damages.**—If an officer wantonly and maliciously arrests an innocent man he is liable in as heavy punitive damages as a private person would be for a causeless and malicious prosecution; but if without notice, and in the honest endeavor to arrest and bring a felon to justice, he takes an innocent person who is justly suspected, he is not liable at all. (Pa.) *McAleer v. Good*, 782.

### FALSE PRETENSES.

**1. FALSE PRETENSES—Note as Property.**—A note is within the meaning of the words "other property" contained in a statute making it a crime to obtain by false pretenses "money, goods, wares, merchandise or other property" belonging to another person. (Wis.) *Clauson v. State*, 972.

**2. FALSE PRETENSES—Essentials of Offense.**—Property is not obtained by false pretenses if that obtained is only such as the accused is legally entitled to receive, though it is obtained by means of a falsehood. In such case two of the essentials of the crime are lacking—that of an intent to defraud, and an actual defrauding. (Wis.) *Clauson v. State*, 972.

### FORGERY.

#### *What Constitutes.*

**1. FORGERY—Check Payable to Order.**—A check falsely made with intent to defraud, and apparently sufficient on its face is a forgery, though other steps, such as indorsement, are required to be taken to perfect it in the hands of the accused. (Wis.) *Norton v. State*, 979.

**2. FORGERY—Negotiable Paper Payable to Order—Indorsement.** Negotiable paper payable to the order of the payee may be transferred without his indorsement, and cannot be said not to be the subject of a forgery by another person, for the reason that it is without value in his hands. (Wis.) *Norton v. State*, 979.

#### *Evidence.*

**3. EVIDENCE of Other Crimes.**—On a prosecution for falsely uttering a forged instrument with intent to defraud, knowing it to be forged, evidence is properly received against the accused of his indorsing and uttering other forged notes at or about the same time, all payable to him, and that he was then in financial difficulties seeking to raise funds to meet his obligations, and the whole evidence tending to show a general scheme. (N. Y.) *People v. Dolan*, 521.

**4. EVIDENCE, SECONDARY, of Other Forged Writings.**—On a prosecution for uttering forged writings, secondary evidence of other and similar writings, all purporting to be payable to the de-

fendant, is admissible, where notice to produce them has been served on him and they are not produced at the trial, and some, though slight, evidence is first offered tending to prove that such writings are in his possession or under his control. (N. Y.) *People v. Dolan*, 521.

5. **EVIDENCE, SECONDARY, of Forged Writings, Question of Fact, When Properly Determined by the Trial Judge.**—Where secondary evidence of other forged writings is sought to be introduced on the ground that notice to produce the originals has been served on the accused, who has failed to produce them, and that they are in his possession or under his control, and the evidence tends to show a course of business from which it may be presumed that such writings were returned to the accused, a question of fact is presented to the trial judge as to whether such writings are in the possession or under the control of the defendant, the decision of which is not reviewable on appeal. (N. Y.) *People v. Dolan*, 521.

6. **EVIDENCE, Self-serving Declarations.**—On a prosecution for uttering forged promissory notes, the accused is not entitled, for the purpose of showing that he did not know the indorsement was forged, to testify to self-serving declarations and hearsay statements made by him to his clerk to the effect that the latter had admitted that she made the note herself, especially where she, being then present in court, could have been called as a witness. (N. Y.) *People v. Dolan*, 521.

#### FRAUDS, STATUTE OF.

**STATUTE OF FRAUDS—Contract of Agency for the Purchase of Lands.**—If one person employs another as his agent to personally appear at a public sale of land, to bid in, purchase it and take title thereto in the name of the principal, but to pay for it with such agent's money, the principal to repay him upon ascertaining the amount paid for the land and to also pay him a fixed compensation for his services, and such agent bids in and takes title to the land in his own name and then refuses to convey to his principal, the contract is one of agency merely, not relating to a sale of, or to an interest in, lands, and is not within the statute of frauds, and the remedy of the principal is an action at law for damages for a breach of the contract. (N. Dak.) *Schmidt v. Beiseker*, 706.

#### GARNISHMENT.

1. **GARNISHMENT—Debt of Foreign Corporation.**—A debt due from one foreign corporation to another, arising out of a contract entered into in this state at an agency maintained by the debtor corporation for the transaction of its business, is subject to garnishment in an action in this state by a resident plaintiff against the creditor corporation whose place of business is in another state. (Minn.) *Krafve v. Roy*, 346.

2. **GARNISHMENT—Debt of Foreign Corporation.**—In garnishing a debt due from a foreign corporation having a place of business in this state, it is not necessary affirmatively to show that the garnishee has complied with the statutes imposing conditions upon which foreign corporations may do business in the state. Compliance with the law in this respect is presumed. (Minn.) *Krafve v. Roy*, 346.

3. **GARNISHMENT—Injunction Because of.**—An action of assumpsit by a contractor against a railroad company to recover for



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3. **GIFT of Moneys on Deposit, When not Perfect.**—If one causes moneys to be deposited in a bank in his own name "in trust for E.," who is his nephew and at the time single, a declaration declaring that no trust exists and that the deposit is to be payable to her or her order during her life and after her death to E., and makes statements showing that she remembers E. and wants him to have the money thus deposited, but retains the book in her own possession until after her death, she having made a will making no provision for E., the title to such money does not vest in E. (Mass.) *Bailey v. New Bedford Inst. for Savings*, 270.

4. **THE PRESUMPTION of Undue Influence Arising Out of Illicit Sexual Relations Between the Parties**, as where a man makes gifts of great value to his mistress, is not one of law, but one of fact merely, susceptible of being rebutted by evidence. (N. Y.) *Platt v. Elias*, 558.

5. **GIFTS Founded upon Illegal or Immoral Consideration.**—A court of equity will not interfere in the recovery of property given by a donor to a donee for an immoral consideration, as where a man gives large sums to his mistress. (N. Y.) *Platt v. Elias*, 558.

#### GRAND JURY.

1. **A GRAND JURY is Entitled to Decide on Its Own Methods of Procedure** in so far as they are not controlled by statute or immemorial usage having the form of law. It may decide when and in what order witnesses shall be called, and, to some extent, who shall be called. For the purpose of procuring evidence a grand jury is a distinct body, clothed with authority to conduct the examination of witnesses in any way that is not in conflict with established legal rules. (N. Y.) *People v. Sexton*, 621.

2. **GRAND JURY Examination of Children Before.**—A grand jury has the power to determine for itself the qualification of witnesses of tender years, so long as there is a due observance of the statutory safeguards enjoined on other tribunals in similar circumstances. (N. Y.) *People v. Sexton*, 621.

See Indictment.

#### HERDING CATTLE.

See Animals.

#### HIGHWAYS.

1. **HIGHWAYS—Negligence—Liability of Persons Building Pond.** If a pond is constructed by a private person beside a highway, and the horse of another is drowned therein, the right of its owner to recover does not depend upon the condition of the highway itself, and in order to recover he must show that the water which such person placed around and against the highway was so dangerous to travel that barriers were necessary to protect the public against the danger, and that the failure of the defendant to erect them caused the injury. (Ark.) *Strange v. Bodcaw Lumber Co.*, 92.

2. **HIGHWAYS—Negligence—Obstruction or Excavations.**—It is unlawful to make an excavation or to put a dangerous obstruction of any kind adjoining a public highway and leave it in a condition to endanger the safety of those who are traveling thereon, and who themselves are in the exercise of ordinary care. A person making

construction work under a contract cannot be enjoined at the request of the company merely for the reason that a number of the creditors of such contractor have garnished such company. (W. Va.) Deep-water Ry. Co. v. D. H. Motter & Co., 873.

### GAS COMPANIES.

1. **CORPORATIONS—Public Service—Gas Companies.**—The business of supplying gas to meet the demands of the inhabitants of a community, under grant by the state or by a municipal corporation, is of a public nature, and subject to public regulation. (Wis.) City of Madison v. Madison Gas etc. Co., 944.

2. **CORPORATIONS—Gas Companies—Rates.**—One of the conditions for the exercise of the privilege of conducting a gas business under legislative grant is that in the absence of legislative prescription restricting the rate of compensation for the service furnished, the grant carries by implication the obligation to furnish it at a reasonable rate and price. (Wis.) City of Madison v. Madison Gas etc. Co., 944.

3. **CORPORATIONS—Public Service—Fixing Rates to be Charged.** The state, either directly or by delegation to some appropriate agency, has the right to prescribe the charge or rates to be made by a public service corporation for a public service, provided, under the facts and circumstances, the charge fixed is sufficient to afford a reasonable compensation. (Wis.) City of Madison v. Madison Gas etc. Co., 944.

4. **CORPORATIONS—Public Service—Rates Charged—Reasonableness—Judicial Question.**—Whether existing or prescribed rates and charges for service by a public service corporation afford a reasonable compensation is a judicial question. (Wis.) City of Madison v. Madison Gas etc. Co., 944.

5. **CORPORATIONS—Gas Companies—Fixing Rates.**—Although a gas company is obliged to furnish gas at a reasonable rate, no power exists in the court to prescribe, as a fixed charge for such service in future, what it may find to have been a reasonable rate for the service theretofore furnished. (Wis.) City of Madison v. Madison Gas etc. Co., 944.

6. **CORPORATIONS—Gas Companies—Fixing Rates.**—Compelling a gas company to furnish gas to its consumers at a reasonable rate in the future must be secured, either directly or through an appropriate agency, by legislative action prescribing rates or charges which shall be reasonable for the service. (Wis.) City of Madison v. Madison Gas etc. Co., 944.

### GIFTS.

1. **PERSONS Who Will Take Under a Gift or Trust.**—When property is, at a future date, to pass to a certain class of persons, it will be distributed amongst those who at that date compose such class. (N. Y.) Gilliam v. Guaranty Trust Co., 536.

2. **GIFT, Necessity for Delivery and Acceptance.**—Where moneys are on deposit, to pass the property by a gift, there must be a delivery to and an acceptance by the donee, or something which is equivalent thereto. This rule applies to a deposit in a savings bank in the name or as trustee for another. (Mass.) Bailey v. New Bedford Inst. for Savings, 270.

**3. GIFT of Moneys on Deposit, When not Perfect.**—If one causes moneys to be deposited in a bank in his own name "in trust for E.," who is his nephew and at the time single, a declaration declaring that no trust exists and that the deposit is to be payable to her or her order during her life and after her death to E., and makes statements showing that she remembers E. and wants him to have the money thus deposited, but retains the book in her own possession until after her death, she having made a will making no provision for E., the title to such money does not vest in E. (Mass.) *Bailey v. New Bedford Inst. for Savings*, 270.

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such excavation must exercise due care to protect the public against danger from accidents caused thereby, and if necessary erect a fence or guard rails for that purpose. (Ark.) *Strange v. Bodcaw Lumber Co.*, 92.

**3. HIGHWAYS—Negligence—Pond Adjoining Highway.**—A person who causes a deep pond to be constructed adjoining a highway, either by making an excavation or constructing a dam, must erect barriers or guard-rails, or do whatever may be necessary to protect the public against the danger he has created as to them while traveling upon the highway in the exercise of ordinary care, and failing in this duty he is liable for injury to such traveler or to his property, unless the latter is guilty of contributory negligence. (Ark.) *Strange v. Bodcaw Lumber Co.*, 92.

**4. HIGHWAYS—Negligence—Pond Adjoining Highway.**—If a deep pond is constructed adjoining a public highway, and a horse driven along such highway is drowned in the pond, it is no defense for the person constructing the pond that it was placed there by permission of the county judge, who had no power to authorize acts dangerous to the public, nor relieve the defendant from the consequences of his own negligence. (Ark.) *Strange v. Bodcaw Lumber Co.*, 92.

**5. HIGHWAYS—Negligence—Pond Adjoining Highway.**—If a person constructs a deep pond adjoining a highway and a horse is drowned therein, it is no defense that such person had no authority to enter the highway to erect guard-rails or barriers. (Ark.) *Strange v. Bodcaw Lumber Co.*, 92.

**6. HIGHWAYS—Pond Adjoining Highway—Concurrent Causes of Injury.**—If a horse, while being driven along a public highway, becomes frightened at goats thereon, and backs off the highway and is drowned in a deep pond constructed and unguarded by an adjoining land owner, the latter cannot escape liability on the ground that the accident would not have happened if the horse had not thus become frightened. (Ark.) *Strange v. Bodcaw Lumber Co.*, 92.

See Private Ways.

## HOMESTEADS.

**HOMESTEAD—Conveyance by Husband Alone.**—A conveyance of a homestead by a married man without the signature of his wife is void, although she has abandoned him and her home and is living an adulterous life. (Minn.) *Murphy v. Renner*, 418.

## HOMICIDE.

**EVIDENCE, CIRCUMSTANTIAL, Sufficient to Sustain Conviction.**—A conviction for murder, though supported only by circumstantial evidence, will be sustained where it shows a powerful motive for the commission of the crime and unexplained facts and circumstances sufficient to exclude every reasonable hypothesis other than that of the defendant's guilt. (N. Y.) *People v. Sexton*, 621.

## HUSBAND AND WIFE.

*Purchases by Wife—Necessaries.*

**1. HUSBAND AND WIFE—Necessaries.**—A set of "Stoddard's Lectures" is not a necessary which a wife may purchase on the credit

of her husband so as to render him liable. (Wis.) *Shuman v. Steinel*, 961.

**2. HUSBAND AND WIFE—Contracts by Wife on Her Credit.**—If a wife contracts an indebtedness on her own credit, the mere promise of her husband to pay it is of no greater dignity than any other promise without consideration to answer for the debt of another. Such act of the wife is not capable of ratification. (Wis.) *Shuman v. Steinel*, 961.

**3. HUSBAND AND WIFE—Purchases by Wife—Ratification of Husband.**—If a wife, assuming to act as the agent of her husband, orders goods, not necessities, and receives them, and he subsequently, with knowledge of the facts, adopts her act as his own by promising to pay for the goods; or by accepting the benefit of the transaction, or in any other way, he thereby becomes liable for the indebtedness. (Wis.) *Shuman v. Steinel*, 961.

**4. HUSBAND AND WIFE—Purchases by Wife—Ratification by Husband.**—If a wife, assuming to act as the agent of her husband, signs his name to an agreement to purchase goods, and he afterward adopts her act, the contract becomes, in legal effect, his from the beginning, and is enforceable as such. (Wis.) *Shuman v. Steinel*, 961.

**5. HUSBAND AND WIFE—Contract of Purchase by Wife—Ratification by Husband.**—Evidence that a husband has stated that if his wife has entered into a contract to purchase goods not necessities, he will pay for them at a certain rate per month, which condition is assented to by the vendor, is sufficient to take the question of the husband's ratification of such contract to the jury. (Wis.) *Shuman v. Steinel*, 961.

#### *Tenancy by Entireties.*

**6. TENANCY BY ENTIRETIES—Municipal Lien.**—If a husband and wife are registered owners by entireties of a city lot, and a municipal lien is filed against the wife alone, upon which judgment is entered against her only, the lien, as to her husband, is a nullity, and a sale thereunder passes no title, and if the wife buys at such sale, she buys nothing that she did not have before, namely, her own right of survivorship. (Pa.) *Alles v. Lyon*, 791.

#### *Torts of Husband to Wife.*

**7. LIABILITY OF HUSBAND to Wife for Personal Torts.**—A woman cannot, either before or after her divorce, maintain a civil action against her husband for a personal tort committed by him against her during coverture. (Minn.) *Strom v. Strom*, 387.

See Homestead; Limitation of Actions, 1.

### IMPUTED NEGLIGENCE.

See Negligence, 1.

### INCEST.

**INCEST—Consent.**—The consent of both parties is not essential to the crime of incest. (La.) *State v. Freddy*, 195.

## INDICTMENT.

1. **CONSTITUTIONAL LAW—Dismissal of Indictment for Insufficiency of the Evidence Before the Grand Jury.**—If the legal evidence received by the grand jury is insufficient to support an indictment, or the illegal evidence received by it is the sole basis of the indictment, the person indicted has a constitutional right to move to dismiss the indictment, notwithstanding a statutory provision to the contrary, and if the motion is denied, the action of the court in denying it may be reviewed on appeal from the judgment of conviction. (N. Y.) *People v. Sexton*, 621.

2. **INDICTMENT Based Partly on Incompetent Evidence.**—The fact that some incompetent evidence was received in connection with competent evidence, or that an incompetent witness was examined, is not a ground for quashing an indictment. (N. Y.) *People v. Sexton*, 621.

See Obscenity; Rape, 9.

## INJUNCTION.

*Grounds for Issuance of Injunction.*

1. **INJUNCTION—Equity will not Lend Aid** by injunction to enforce mere moral obligations. (Wyo.) *Healy v. Smith*, 1004.

2. **INJUNCTION—Abuse of Franchise.**—An injunction will lie at the suit of private parties, to restrain acts in excess and abuse of a corporate franchise and privilege, resulting in private injury. (Wis.) *City of Madison v. Madison Gas etc. Co.*, 944.

3. **INJUNCTION may be Granted to Prevent the violation of personal rights.** (La.) *Itzkovitch v. Whitaker*, 215.

4. **INJUNCTION—Photograph for Rogues' Gallery.**—An injunction will lie to prevent the taking of a photograph of a person accused of crime, and from placing such photograph in the rogues' gallery, until after his conviction, unless it is clearly shown that it should be taken before conviction, either for identification or the detection of crime. (La.) *Itzkovitch v. Whitaker*, 215.

5. **INJUNCTION to Protect Fishing Rights.**—A complaint for an injunction alleging that the complainant is the owner in fee of a certain island, and has been in the actual possession thereof and the fishing rights pertaining thereto for upward of twenty years, and that the fishing rights are worth a large sum annually, that the defendant had theretofore leased such fishing rights, that his lease had expired, that he threatens to continue fishing and trespassing upon the premises for the coming year which would result in irreparable loss to the complainant, and that the defendant is irresponsible financially, states a good prima facie case for an injunction. (Mich.) *Saginaw Lumber etc. Co. v. Griffore*, 297.

*Injunction Against Trespasses of Livestock.*

6. **INJUNCTION—Pasturing Public Lands.**—One stock-grower cannot enjoin another from grazing or pasturing his livestock upon the public domain. (Wyo.) *Healy v. Smith*, 1004.

7. **INJUNCTION Against Pasturing Uninclosed Lands.**—As to animals wandering at large in a lawful manner, equity will not enjoin their owner from allowing them voluntarily to trespass upon and depasturing in inclosed private premises. (Wyo.) *Healy v. Smith*, 1004.

8. **INJUNCTION Against Depasturing Uninclosed Premises.**—In a proper case, where the other necessary elements of equity jurisdiction are present, an injunction will lie to restrain a livestock owner from willfully and knowingly driving or turning his stock upon the uninclosed premises of a private owner. In such case it is, however, necessary to show a reasonable probability of the commission of the wrongful act and a well-grounded apprehension of resulting injury. (Wyo.) *Healy v. Smith*, 1004.

9. **INJUNCTION Against Depasturing Uninclosed Land.**—The mere fact that a person owns a tract of uninclosed land, and that another owns a herd of sheep which he proposes to graze upon the public land in the same locality, will not justify an injunction to restrain him from driving his sheep upon such uninclosed land. (Wyo.) *Healy v. Smith*, 1004.

10. **TRESPASS—Depasturing Uninclosed Lands—Injunction.**—A single act of trespass committed by an owner of livestock upon two of a number of private uninclosed tracts of land without any threat of continuance, or any showing of permanent injury, is not sufficient ground for an injunction restraining such owner from trespassing upon all of the private lands in the locality in dispute, which consists largely of public lands. (Wyo.) *Healy v. Smith*, 1004.

*Motion to Dissolve Injunction.*

11. **INJUNCTION—Motion to Dissolve for Want of Equity in Bill.** If there is no equity in the bill, a motion to dissolve a preliminary injunction should be sustained. (W. Va.) *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 901.

12. **INJUNCTION—Motion to Dissolve.**—Upon the hearing of a motion to dissolve an injunction, no answer having been filed, the allegations of the bill must be taken to be true. (W. Va.) *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 901.

*Disregarding Injunction.*

13. **INJUNCTION—Failure to Appeal—Disregarding Injunction—Certiorari.**—If, after a full hearing, the court, in the exercise of its discretion, refuses to dissolve an injunction granted temporarily, and no appeal is taken, but the defendant proceeds to ignore it, he is not entitled to a writ of certiorari to set aside his conviction for such contempt on the ground that the injunction is void. (Mich.) *Saginaw Lumber etc. Co. v. Griffore*, 297.

See Garnishment, 8; Municipal Corporations, 9, 10.

## INSTRUCTIONS.

See Trial, 5-7.

## INSURANCE.

*Life Insurance.*

1. **INSURANCE, LIFE—Lapse and Revival.**—If a life insurance policy provides that in case of lapse for nonpayment of premium, it may be revived at any time within two years upon written application, and payment of arrears of premium, provided evidence of the insurability of the insured, satisfactory to the insurer, is furnished, an insured applying for revival does not stand in the same position as a new applicant, but has a contract right to revival upon the specified



conditions, and when these conditions have been complied with, the insurer is bound to act with reasonable promptness and fairness in passing upon the application and notify the insured of the result. The insurer has no right to arbitrary refusal in such case, nor to act upon any information secretly obtained without opportunity for the insured to meet it, and if the insurer acts arbitrarily and unreasonably upon secret information, he is liable on the policy. (Wis.) *Leonard v. Prudential Ins. Co.*, 50.

**2. INSURANCE, LIFE, Right to Deduct Semi-annual Premiums from the Amount Due.**—If a life insurance policy provides for the payment of premiums semi-annually, but contains a condition that in case of the receipt of a quarterly or semi-annual premium, any future payments which at maturity of the contract are necessary to complete the full year's premiums shall be deducted from the amount of the claim, if the insured dies during the first half of the policy year, semi-annual premium for which has not been paid, the insurer is entitled to deduct from the policy the semi-annual premium for the second half of the insurance year. (N. Y.) *Bracher v. Equitable Life Assurance Soc.*, 533.

#### *Fire Insurance.*

**3. INSURANCE, FIRE—Contract for.**—It is essential to a valid contract of insurance that the time of the commencement of the risk be agreed upon. (Wis.) *Whitman v. Milwaukee Fire Ins. Co.*, 25.

**4. INSURANCE, FIRE—Contract for.**—An application to an insurance company for a policy of fire insurance and a promise by its agent to attend in due time to the matter of taking such further steps as were necessary to effect the insurance, subject to the action of the insurer, do not constitute a valid contract for insurance in praesenti. (Wis.) *Whitman v. Milwaukee Fire Ins. Co.*, 25.

**5. INSURANCE, FIRE—Oral Contract for.**—A valid contract for fire insurance may be made orally, but it requires a meeting of the minds of the parties as to all of the essential provisions. (Wis.) *Whitman v. Milwaukee Fire Ins. Co.*, 25.

**6. INSURANCE, FIRE—Policy to Carrier on Goods in Custody.**—If goods shipped to a person are allowed, under a long standing arrangement between him and the carrier, to remain in the latter's warehouse until the former, by written order, directs delivery to his customers, such goods are in the custody of the carrier as a warehouseman within the meaning of a fire insurance policy issued to such carrier. (Wis.) *Kellner v. Fire Association of Philadelphia*, 45.

**7. INSURANCE, FIRE—Property Covered.**—A policy of fire insurance issued to a carrier, insuring it, "and other owners as interest may appear," against loss on merchandise, on the property belonging to the carrier or in its custody as a warehouseman, contained in a certain warehouse, covers the property designated, and not merely the carrier's interest or liability in respect to it. (Wis.) *Kellner v. Fire Association of Philadelphia*, 45.

**8. INSURANCE, FIRE—Property Covered—No Power in Carrier to Exclude.**—If a policy of fire insurance issued to a carrier insures it and "other owners as interest may appear" against loss on merchandise in its custody as a warehouseman, and stipulates that the carrier, although it may or may not be liable for any loss, shall, after a loss, give notice to said assurer who was insured thereby, and said notice shall be conclusive upon the assurer as to who, in addition

to said carrier, was so insured, this gives the carrier no right to cut off, by electing not to include, designated owners of property covered by the policy. (Wis.) *Kellner v. Fire Association of Philadelphia*, 45.

**9. INSURANCE, FIRE—Policy Issued to Carrier—Rights of Owners.**—Under a policy of fire insurance issued to a carrier and insuring it, and "other owners as interest may appear," against loss on merchandise in its custody as a warehouseman, an owner of property covered thereby has a right, when a loss occurred, to adopt the acts of his agent, the carrier, and thereby to secure the benefit resulting from the policy, just as though it had been expressly issued to him. (Wis.) *Kellner v. Fire Association of Philadelphia*, 45.

**10. INSURANCE, FIRE—Condition to Keep Books.**—If a person insured against loss by fire of merchandise and fixtures keeps books showing how many goods were received, and how many were sold from the date of the issuance of the policy up to the time of the fire, he substantially complies with a condition in his policy that he should keep a set of books presenting a complete record of the business transacted, including all purchases, sales and shipments both for cash and credit. (Ark.) *Security Mut. Ins. Co. v. Woodson*, 75.

**11. INSURANCE, FIRE—Misrepresentation by Agent—Sole and Unconditional Ownership.**—A false representation of sole and unconditional ownership by the insured of the goods covered by the policy does not avoid it, when such representation is superinduced by the agent of the insurer, who, knowing its falsity at the time, wrote such falsehood into the application for the insurance. (Ark.) *Security Mut. Ins. Co. v. Woodson*, 75.

**12. INSURANCE, FIRE—Waiver of Forfeiture of Policy.**—If a fire insurance policy stipulates that, unless otherwise provided by agreement indorsed thereon or added thereto, it shall become void if foreclosure proceedings are commenced with the knowledge of the insured, a forfeiture thus incurred is not waived by the silence of the insurer after knowledge of the facts nor by its retention of proof of loss not invited by it, nor by its failure to tender back an unearned premium, although the insured was thereby induced to believe that it should be continued in force. (Wis.) *Woodard v. German-American Ins. Co.*, 17.

**13. INSURANCE, FIRE—Forfeiture—Rights of Mortgagee.**—If the cause of action on a fire insurance policy has been lost to the insurer through forfeiture of the policy, a mortgagee, for whose benefit the insurance was procured, has no greater right than the insured. (Wis.) *Woodard v. German-American Ins. Co.*, 17.

**14. INSURANCE, FIRE—Waiver of Forfeiture by Agent.**—After the execution and forfeiture of a policy of fire insurance neither knowledge of the forfeiture coming to the agent who insured the policy, silence on his part, nor failure to return unearned premiums amounts to a waiver of the forfeiture in the absence of an agreement to that effect provided by the policy, indorsed thereon or added thereto. (Wis.) *Woodard v. German-American Ins. Co.*, 17.

**15. INSURANCE, FIRE—Proof of Loss.**—If an insurer is notified of a loss by the insured soon after it has occurred, and the latter has submitted an itemized statement of the different articles destroyed in the form of two schedules, one containing those articles which the insured claimed were included, and the other those articles and the names of the owners which may have been insured under the

policy, this is sufficient notice and proof of loss to entitle the insured to recover. (Wis.) *Kellner v. Fire Association of Philadelphia*, 45.

16. **INSURANCE, FIRE—Waiver of Proof of Loss.**—A fire insurance company, by denying any liability whatever under its policy, and refusing to pay a loss, waives proof of loss. (Ark.) *Security Mut. Ins. Co. v. Woodson*, 75.

## JUDGES.

**JUDGES—Termination of Term—Signing Bill of Exceptions After.**—A judge may settle and sign a bill of exceptions after his term of office expires in a case tried by him while holding the office, and such act is not in conflict with a constitutional provision, limiting the term of office of such judge to a specified number of years. (Utah) *Larkin v. Saltair Beach Co.*, 818.

## JUDGMENTS.

### *Fraud in Procurement.*

1. **JUDGMENTS—Fraud in Procurement.**—If a decree of divorce is obtained upon constructive service by plaintiff's falsely alleging that he resided in the county where the action was brought, and that his wife was a nonresident of the state, she is entitled to have the decree set aside on the ground that it was procured by fraud, and the court will, at her instance, vacate the decree and dismiss the complaint for want of jurisdiction. (Ark.) *Corney v. Corney*, 80.

2. **JUDGMENTS—Fraud in Procurement—Want of Jurisdiction.**—If a decree of divorce is obtained by fraud, and without jurisdiction, a suit will lie after the term to have it vacated and set aside, whether there was a valid defense to the original suit or not. (Ark.) *Corney v. Corney*, 80.

### *Res Judicata.*

3. **JUDGMENTS—Res Judicata.**—A judgment in favor of the maker of a note in an action thereon, on the ground that it was not stamped with the proper internal revenue stamp, is *res judicata* as to a subsequent action between the same parties on the same note after the proper internal revenue stamp has been affixed thereon. (Pa.) *Boney v. Westlake*, 772.

4. **JUDGMENTS—Res Judicata.**—If a person procures the bringing of an action in the name of the state against another to recover a statutory penalty for obstructing an alleged highway, and the district attorney is called into the case but does not interfere with its management and prosecution by such person and his attorney, a judgment therein that the road in suit is not a public highway is conclusive and binding upon him in a subsequent action against him to restrain him from passing over such road and removing barriers therefrom, although he was not a party to the record in the first action. (Wis.) *Kolpack v. Kolpack*, 29.

5. **JUDGMENTS—Res Judicata—Parties.**—If a judgment is rendered at a time when the judgment debtor has title to certain land and thereupon becomes a lien thereon, after which, and before execution sale thereunder, suit is commenced against the judgment debtor to cancel the deed under which he holds the land for fraud, notice of *lis pendens* is given, and judgment rendered canceling such deed

but without making the first judgment creditor a party to the action, and he subsequently purchases the land at execution sale under his judgment, he is not bound by the judgment canceling such deed, so as to relieve the judgment debtor's grantor, in a suit to recover the land from such judgment creditor, from the necessity of proving that such deed was obtained by fraud. (Utah) *Larsen v. Gasberg*, 859.

See Corporations, 3.

## JURISDICTION.

See Courts.

## JURY.

1. **JURY—Challenge.**—A juror's conscientious scruples against capital punishment, or his preconceived opinion of the guilt or innocence of the accused, is a good ground of challenge. The test of such scruples or such opinion as a disqualification is the juror's own testimony as to his ability to throw aside their influence and render a verdict according to the evidence alone, but this test is not to be applied solely on the juror's own conclusion, and his ability as well as his willingness must be shown to the satisfaction of the trial judge who must be allowed a large measure of discretion. (Pa.) *Commonwealth v. Minney*, 763.

2. **JURY—Challenges for Cause.**—If a juror testifies that he has conscientious scruples against capital punishment, but that he would bring in a verdict according to the evidence alone, although it would worry his conscience, or do violence to his conscience, a challenge for cause is sustainable. (Pa.) *Commonwealth v. Minney*, 763.

3. **JURY—Right to Service of Particular Juror.**—A person accused of crime has no right to the service of any particular juror on his panel, and a legal and impartial jury is all that he is entitled to. (Pa.) *Commonwealth v. Minney*, 763.

4. **JURY—Challenge—"Fixed Opinion."**—Although a juror testifies that he has a fixed opinion, this does not disqualify him from serving on the jury if he declares that he can disregard such opinion, and be governed by the evidence alone. (Pa.) *Commonwealth v. Minney*, 763.

## LABOR UNIONS.

See Trade Unions.

## LANDLORD AND TENANT.

1. **LANDLORD AND TENANT—Right of the Latter's Servants as Against the Former.**—A servant or other employé of a tenant can have no greater rights than his employer has arising out of personal injuries due to the condition of the leased premises. (Mass.) *Dalton v. Gibson*, 218.

2. **LANDLORD AND TENANT—Stipulation for Repairs by the Lessee.**—If, by the terms of a lease, the tenant is bound to keep the building, or some specific part thereof, in repair, neither he nor his employes can recover for personal injuries due to want of repair, if the premises were in good condition when the tenancy began. (Mass.) *Dalton v. Gibson*, 218.

**3. LANDLORD AND TENANT—Repair, Covenant for by the Tenant, When not Waived.**—The fact that the landlord did some repairs to the leased premises not in pursuance of any agreement to repair is not an admission of liability or obligation to repair on his part, when the lease under which the tenant entered stipulated that he should do the repairing. (Mass.) *Dalton v. Gibson*, 218.

### **LIBEL.**

**1. LIBEL.**—Written or Printed Publications, Caricatures, Pictures or Effigies which falsely tend to bring a person into public disgrace, contempt or ridicule are libelous. (Wis.) *Wandt v. Hearst's "Chicago American,"* 959.

**2. LIBEL.**—"Suicide Fiend."—A newspaper article falsely stating that a certain person is a suicide fiend, has attempted suicide twenty-five times, and would usually go to the hospital and ask to be pumped out, is libelous as tending to bring such person into public ridicule and contempt. (Wis.) *Wandt v. Hearst's "Chicago American,"* 959.

**3. LIBEL.**—"Suicide Fiend"—Picture Published with Article.—If a newspaper article, accusing a certain person with being a "suicide fiend," is accompanied by a picture in such a way as to be in effect a statement that it is a picture of the person referred to, both together constitute a libel, although the published article gives as the name of the person referred to a name other than that of the person whose picture is published, and although the latter may have been damaged in the estimation of friends. (Wis.) *Wandt v. Hearst's "Chicago American,"* 959.

**4. LIBEL.**—Publication of Indebtedness—*Libel Per se.*—To write and publish of one, not a trader or merchant and not of or concerning his business affairs, that he is indebted to another, and, though able to pay, has neglected or refused to do so, is not such an impeachment of his honesty, nor does it import such degradation of morals or character, nor so expose him to public hatred or ridicule nor so tend to disgrace him, that it can be said as matter of law or by a presumption of evidence, that such publication is libelous *per se*, and must necessarily occasion damage and pecuniary loss to him, and he is not entitled to recover therefor without proof that the publication was actuated by malice and that he has suffered actual damages. (Utah) *Nichols v. Daily Reporter Co.*, 796.

**5. LIBEL.**—Publication of Indebtedness—*Libel Per se.*—To write and publish of a certain person, who is a candidate for office, that he owes a debt to the publisher and has not paid it, is not of itself sufficient to make the publication libelous, when such person is not engaged in business, or when it is not said of or concerning him in the conduct of his trade or business, but such words may become libelous by proof of extraneous circumstances if special damages are shown. (Utah) *Nichols v. Daily Reporter Co.*, 796.

**6. LIBEL.**—Candidate for Office.—The fact that one is a candidate for office affords in many instances a legal excuse for publishing language concerning him as such candidate, for which publication there could be no legal excuse if he did not occupy the position of such candidate, and to publish of one candidate for office that he is honest does not carry the implication that another candidate, disparagingly spoken of, is dishonest. (Utah) *Nichols v. Daily Reporter Co.*, 796.

**Nota.**

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- by charging acts tending to expose one to hatred or contempt, 811.
- by charging a newspaper with insincerity, 812.
- by charging officers with corruption or unfitness for office, 815.
- by charging one with being a bastard, 810.
- by charging one with being a common liar, 812.
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- by charging one with being guilty of inhuman conduct to man or beast, 811, 812.
- by charging one with a criminal disposition, 814.
- by charging one with cowardice, 810.
- by charging one with expulsion from church, 809.
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- by charging one with insolvency, 817.
- by charging one with lack of knowledge, skill, or integrity, 814.
- by charging one with political corruption, 814, 815.
- by charging one with poverty, misery, etc., 811.
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- by charging one with want of honesty, 812.
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- test of words which are actionable per se, 804-807.
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**LICENSES.**

See Constitutional Law.

**LIENS.**

See Mechanics' Liens; Railroads, 9.

**LIMITATION OF ACTIONS.***In General.*

1. **LIMITATIONS OF ACTIONS—Married Women.**—If the owner of property is a married woman at the time possession thereof is taken by a third person, the statute of limitations does not run against her during her coverture. (Mo.) *Bucher v. Hohl*, 492.

2. **LIMITATION OF ACTIONS—Foreign Corporations.**—A corporation, though created by the laws of another state, is deemed to be present in the state where it is continuously doing business, and with whose laws it has complied, and it is entitled to the protection of the statute of limitations of such state, if it has an agent there and is amenable to personal service of the process of the courts of that state. (N. Dak.) *Colonial etc. Mtg. Co. v. Northwest Thresher Co.*, 642.

3. **LIMITATION OF ACTIONS—Tolling of Statute—Burden of Proof.**—If plaintiff's pleadings and evidence show that the cause of action accrued more than ten years before the commencement of the action, the burden of proof is on him to show that the running of the statute has been suspended a sufficient length of time to avoid the statutory bar of limitation pleaded by the defendant. (N. Dak.) *Paine v. Dodds*, 674.

4. **LIMITATION OF ACTIONS—New Trial.**—If the evidence tends to show that the action is barred by limitation as to one or more unequal parts of the land which is undivided, and not barred as to other parts, but fails to disclose as to which parts the statutory bar is complete, and such uncertainty in the proof is due to the fact that neither the trial court nor counsel deemed such proof material, a new trial will be ordered. (N. Dak.) *Paine v. Dodds*, 674.

*Foreclosure Proceedings—Absence from State.*

5. **LIMITATION OF ACTIONS—Foreclosure Proceedings.**—An action to foreclose a real property mortgage is an action in personam and not in rem, and the absence from the state of the person against whom the cause of action accrues stays the running of the statute of limitations. (N. Dak.) *Colonial etc. Mtg. Co. v. Northwest Thresher Co.*, 642.

6. **LIMITATION OF ACTIONS—Foreclosure of Mortgage.**—An action to foreclose a real estate mortgage is a remedy distinct from remedies by which the creditor may enforce the personal obligation for the mortgage debt, and the foreclosure action and the right there-to may become barred by limitation, even though the mortgage debt is not so barred. (N. Dak.) *Colonial etc. Mtg. Co. v. Northwest Thresher Co.*, 642.

7. **LIMITATION OF ACTIONS—Right of Mortgagor's Grantee to Plead on Foreclosure.**—The grantee of a mortgagor may avail himself of the plea of the statute of limitations as a defense to an action to foreclose the mortgage, although the debt is neither discharged nor barred as against the original mortgagor. (N. Dak.) *Colonial etc. Mtg. Co. v. Northwest Thresher Co.*, 642.

8. **LIMITATION OF ACTIONS—Foreclosure Proceedings.**—An action to foreclose a mortgage of real property is not one in rem, but is in personam against those interested in the mortgaged property adversely to the mortgage, and the absence from the state of the person against whom the cause of action accrues tolls the statute

of limitation as to him during his absence. (N. Dak.) Colonial etc. Mtg. Co. v. Flemington, 670.

**9. LIMITATION OF ACTIONS.—Right to Foreclose** a real estate mortgage may be barred by limitation, even though the debt still exists and the remedies for its collection from those personally liable therefor are not barred. (N. Dak.) Colonial etc. Mtg. Co. v. Flemington, 670.

**10. LIMITATION OF ACTIONS.—Right of Mortgagor's Heirs to Plead on Foreclosure.**—The failure to appoint an administrator of the estate of a deceased mortgagor and debtor does not prevent the statute of limitations from running in favor of the mortgagor's heirs against an action to foreclose the mortgage. (N. Dak.) Colonial etc. Mtg. Co. v. Flemington, 670.

**11. LIMITATION OF ACTIONS.—Foreclosure Proceedings.**—An action to foreclose a real property mortgage is a proceeding in personam and not in rem, and within the operation of a statute excepting from the period limited for commencing an action the time during which the person against whom the cause of action has accrued is absent from the state. (N. Dak.) Paine v. Dodds, 674.

**12. LIMITATION OF ACTIONS.—Foreclosure.—Proceedings.—Grantee of Mortgagor.**—Although mortgaged property has passed to the defendant's grantor, subject to the mortgage, and is in equity the primary fund for the payment of the mortgage debt, the defendant is still entitled to avail himself of the plea of the statute of limitations as a defense to an action to foreclose the mortgage. (N. Dak.) Paine v. Dodds, 674.

**13. LIMITATION OF ACTIONS.—Tacking.—Mortgage Foreclosure.** A grantee of mortgaged premises may add to the time that the statute of limitations has run in his favor the time it has run in favor of his grantor, in order to make up the aggregate period required to bar an action of foreclosure. (N. Dak.) Paine v. Dodds, 674.

**14. LIMITATION OF ACTIONS.—Foreclosure Proceedings.—Absence from State.**—The absence of the mortgagor from the state after he has parted with the title to the mortgaged property does not prevent the statute of limitations from running in favor of his grantee. (N. Dak.) Colonial etc. Mtg. Co. v. Northwest Thresher Co., 642.

**15. LIMITATION OF ACTIONS.—Absence from State.**—If a person against whom a cause of action has accrued departs from and establishes his residence out of the state, the statute of limitations ceases to run in his favor from the date of his departure. (N. Dak.) Paine v. Dodds, 674.

**16. LIMITATION OF ACTIONS.—Absence from State.**—A statute providing that only absence of one year or more from the state shall toll the running of the statute of limitations refers to an absence by one who has not established a residence out of the state. (N. Dak.) Paine v. Dodds, 674.

#### *New Promise.*

**17. LIMITATION OF ACTIONS.—New Promise.**—An acknowledgment of a debt, in order to be sufficient to remove the bar of the statute of limitations, must contain an unqualified and direct admission of a present subsisting debt, which the party is liable and willing to pay, and be unaccompanied by any circumstance or declaration which repels the presumption of a promise or intention to pay. (Mich.) Throop v. Russell, 314.



**18. LIMITATION OF ACTIONS—New Promise.**—A letter by the maker to the payee of a note against which the statute of limitations has run, stating that the fact that the note has outlawed need not enter into the matter, that he will try to raise a certain sum, less than the face of the note, if the payee will surrender it, and that, if in the future the latter needs any money, the maker of the note will endeavor to give it to him, and is not "backing up or repudiating anything," is a conditional promise and does not remove the bar of the statute of limitations. (Mich.) *Throop v. Russell*, 314.

*Part Payment.*

**19. LIMITATION OF ACTIONS—Part Payment.**—A Judgment for the recovery of money does not come within the rule that part payment revives and continues in force a contract obligation for the payment of money. (Minn.) *Olson v. Dahl*, 435.

**20. LIMITATION OF ACTIONS—Part Payment of Judgment.**—A cause of action is merged in the judgment and becomes extinct, and a part payment of the judgment, after the bar of the statute of limitations, does not, by implication, revive the original indebtedness and authorize an action to recover thereon. (Minn.) *Olson v. Dahl*, 435.

**LIS PENDENS.**

**1. LIS PENDENS—When Applies.**—If the relief sought in a suit is for the recovery of the possession, or the enforcement of a lien, or an adjudication between conflicting claims of title, or any other judicial action affecting the title, possession or right to possession of specific property, then the property is so directly affected by the decree sought that it becomes subject to the law of lis pendens. (W. Va.) *Wingfield v. Neall*, 882.

**2. LIS PENDENS—Object of Rule.**—The prime object of the rule of lis pendens is to preserve the property, which is the subject of litigation, in order to make it possible for the courts to execute their final judgments and decrees. (W. Va.) *Wingfield v. Neall*, 882.

**3. LIS PENDENS—Purchaser Pendente Lite.**—To make a person a pendente lite purchaser, within the rule of lis pendens, there must be at the time of the purchase a pending suit. (W. Va.) *Wingfield v. Neall*, 882.

**4. LIS PENDENS—Writ of Error—Purchaser Pendente Lite.**—A writ of error is a new action, and one who purchases the subject of litigation between the time of the entry of final judgment and the suing out of the writ is not regarded as a pendente lite purchaser within the rule of lis pendens, but is considered a purchaser, without notice. (W. Va.) *Wingfield v. Neall*, 882.

**5. LIS PENDENS—Appeal—Purchaser Pendente Lite.**—A statutory appeal is a new action, and one who purchases the subject of the litigation between the time of the entry of the final judgment and the perfection of the appeal is not regarded as a purchaser pendente lite within the rule of lis pendens, but as a purchaser without notice. (W. Va.) *Wingfield v. Neall*, 882.

**6. LIS PENDENS—Injunction—Purchaser Pendente Lite.**—If the holder of a trust deed attempts to sell the land conveyed thereby to pay delinquent installments of purchase money, and such sale is enjoined, and, pending the litigation and before an appeal is perfected from the judgment granting the injunction, the land is regularly returned delinquent for the nonpayment of taxes, and is legally

sold and conveyed to one who in turn sells and conveys it to another, the latter secures a good title, and the rule of *lis pendens* does not apply. (W. Va.) *Wingfield v. Neall*, 882.

### MANDAMUS.

1. **MANDAMUS Against Corporations—Enforcement of Contract** Mandamus will not lie to compel a private corporation to perform its contract with an individual. The remedy in such case is either for damages for breach of the contract or to compel its specific performance. (Wis.) *State v. Milwaukee Medical College*, 21.

2. **MANDAMUS—Removal from Office—Payment of Salary.**—Mandamus will lie to compel the payment of his salary to a public officer who is alleged to have been removed from office, though as incidental to the determination of that matter it may be necessary to decide upon the legality of his removal. The application will be entertained merely to the extent of determining whether the relator is entitled to the relief prayed for, and not for the purpose of trying the title to the office as between the contesting claimants. (Wyo.) *State v. Grant*, 982.

3. **MANDAMUS, Proceeding for, When Does not Abate on a Change of Officers.**—A proceeding by mandamus against an officer of a municipality, who, by his personal act, deprives a party of a right to which he is entitled, does not abate on the death, resignation, or removal of the officer or the termination of his term of office, but the proceeding may be continued and the writ issued against his successor in office. (N. Y.) *People v. Best*, 586.

4. **MANDAMUS, Substitution of Successor in Office in Proceedings for.**—When an application for a writ of mandate has been made and argued, but written briefs are still to be filed before the decision is to be made, and the officer against whom the writ issues resigns, the substitution of his successor in office is necessary. (N. Y.) *People v. Best*, 586.

### MARRIED WOMEN.

See Husband and Wife.

### MASTER AND SERVANT.

#### *Defective Tools and Machinery—Inspection.*

1. **MASTER AND SERVANT—Inspection of Tools.**—An employer is under no duty to inspect simple or common tools, or to discover or remedy defects arising necessarily from the ordinary use of such instruments. This rule applies to an ordinary alledge of hammer, purchased by the employer from a wholesale hardware dealer, and delivered to the employé in good condition. (Minn.) *Koschman v. Ash*, 373.

2. **MASTER AND SERVANT—Defective Machinery—Proof of Precise Defect.**—An employé suing his master for personal injury caused by defective machinery need not, in order to recover, prove specifically what particular defect caused the accident. (Utah.) *Tuckett v. American Steam and Hand Laundry*, 832.

#### *Assumption of Risks.*

3. **MASTER AND SERVANT—Assumption of Risks.**—A servant does not, in the first place, undertake to incur the risks arising from

defective machinery, and to hold that he has assumed such risks, he must not only have known of such defect, but also of the danger arising therefrom. (Utah) *Tuckett v. American Steam and Hand Laundry*, 832.

**4. MASTER AND SERVANT—Assumption of Risk—Defective Machinery.**—A laundry employé, who merely knows that an ironing machine being operated by her is running in a jerky and unsteady manner does not as matter of law assume the risk of injury arising from the machine suddenly starting forward caused by its defective condition. (Utah) *Tuckett v. American Steam and Hand Laundry*, 832.

**5. MASTER AND SERVANT—Defective Machinery—Assumption of Risks.**—An employé has a right to assume that the master will use reasonable diligence in furnishing him with a machine suitable to operate, and if the master fails to perform this duty, the employé is entitled to recover, unless the defect in the machine which caused the injury was known to such employé, or so patent that he could readily have observed it. (Utah) *Tuckett v. American Steam and Hand Laundry*, 832.

**6. MASTER AND SERVANT—Defective Machinery—Assumption of Risks—Burden of Proof.**—It by no means follows that simply because an employé may have believed that a machine operated by him was defective, that, as matter of law, he knew, or ought to have known, that it was defective to the extent that it was dangerous, and in such case the burden of proving that the employé was not ignorant of the danger is upon the master. (Utah) *Tuckett v. American Steam and Hand Laundry*, 832.

**7. MASTER AND SERVANT—Order of Master—Assumption of Risks—Contributory Negligence.**—In an action by an employé to recover for an injury sustained through his master's negligence in ordering him to do dangerous work in a particular manner, the master may plead the defense of assumed risk and contributory negligence. (Utah) *Tuckett v. American Steam and Hand Laundry*, 832.

**8. MASTER AND SERVANT—Order of Master—Assumption of Risks—Contributory Negligence.**—If a servant is directed by his master to perform a certain piece of dangerous work in a particular manner, he is ordinarily justified in obeying the order thus given without being chargeable with the assumption of risk incident to the work, or with contributory negligence in obeying the order, unless the risk arising therefrom is open and obvious or when no person of ordinary prudence, would obey the order. (Utah) *Tuckett v. American Steam and Hand Laundry*, 832.

*Negligence—Proximate Cause.*

**9. MASTER AND SERVANT—Negligence—Proximate Cause.**—If, in an action by an employé to recover for personal injury alleged to have been caused by defective machinery, the evidence tends to show that the master was negligent in permitting such machinery to become and remain in a defective condition, it is a question of fact for the jury to determine whether, under all of the circumstances, such negligence was the proximate cause of the injury, when it cannot be said, as matter of law, that the employé assumed the risk of injury, or was guilty of contributory negligence. (Utah) *Tuckett v. American Steam and Hand Laundry*, 832.

**10. MASTER AND SERVANT—Order of Master—Negligence—Proximate Cause—Burden of Proof.**—An order of the master to his

employé to perform his work, which is dangerous, in a particular manner may constitute negligence, and when it does, the employé injured by compliance with such order may count upon such negligence when suing for the injury, but he has the burden to prove that the obeying of the order was the proximate cause of the injury. (*Utah*) *Tuckett v. American Steam and Hand Laundry*, 832.

### MECHANICS' LIENS.

1. **MECHANICS' LIENS—Architects.**—If an architect not only draws the plans, but also superintends the construction of the building under a contract with the owner, he is entitled to a mechanic's lien, and this under statutes which merely give such lien in general terms for work and labor furnished in the erection of a building. (*N. Dak.*) *Friedlander v. Taintor*, 697.

2. **MECHANICS' LIENS—Homestead in Public Land.**—Land held under the United States homestead laws prior to the issuance of patent is exempt from mechanics' liens based on contracts made while the title remains in the United States. (*N. Dak.*) *Green v. Tenold*, 638.

3. **MECHANICS' LIENS—Interest in Land.**—No mechanic's lien can attach to land or to a building thereon unless the owner of the building has some interest or estate in the land out of which the lien can be enforced, and such building cannot be sold separately from the land to satisfy the lien, except in cases of leasehold interests that have been forfeited or of encumbrances on the land when the materials are furnished. (*N. Dak.*) *Green v. Tenold*, 638.

4. **MECHANIC'S LIEN—Wrong of Contractor.**—Mechanics and Materialmen furnishing labor or materials for a building at the request of the contractor are given by the statute, not simply the right to be subrogated to the rights of the contractor, but an independent right to a lien on the building, which cannot be defeated by the misconduct or fraud of the contractor. (*Minn.*) *Berger v. Turnblad*, 353.

5. **MECHANIC'S LIEN—Work Done Away from Premises.**—It is a general rule that to entitle a mechanic or materialman to a lien the work must be done or the materials delivered on the premises where the building is being erected; but when the material required for a building is specially prepared for it at the shop of the contractor with the consent of the owner, the material is deemed to have been furnished on the premises. (*Minn.*) *Berger v. Turnblad*, 353.

6. **MECHANIC'S LIEN—Work Done in Shop, Rejection of by Contractor.**—If a contractor engaged to erect a house employs a mechanic to do the ornamental plastering, and the principal portion of this work is, with the consent of the owner of the building and the contractor, done at the shop of the contractor instead of at the house, in making designs, models and casts exclusively intended for and adapted to ornamental plastering, but the contractor, after the work is completed, without justifiable cause, refuses to permit it to be placed in the building, and it therefore never becomes a part thereof, the mechanic is entitled to a lien on the house and lot for the value of all his labor. (*Minn.*) *Berger v. Turnblad*, 353.

7. **MECHANICS' LIENS—Counterclaim.**—On a bill to foreclose a mechanic's lien brought on the chancery side of the court, the defendant may maintain a cross-bill or counterclaim to recover damages sustained by the claimant's failure to perform according to the contract, although an answer in the nature of a cross-bill is

counterclaim is not provided for by the lien law. (Mich.) *Koch v. Sumner*, 302.

Note.

Mines, ejectment to recover, when maintainable, 577, 578.

### MONOPOLIES.

1. **ANTI-TRUST LAW**—Illegal Contract—Interstate Commerce. Before a contract can be declared illegal by reason of the act of Congress known as the "Anti-trust Law," such contract must clearly appear to be within the provisions of such act, and must at least contemplate interstate or international commerce in dealing with the commodity which constitutes its subject matter. (W. Va.) *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 901.

2. **MONOPOLIES**—Construction of Contract.—For the purpose of determining whether or not a contract is illegal as creating a monopoly under the rules of the common law, not only the contract must be considered, but also its subject matter, the situation of the parties and all the circumstances surrounding the transaction so far as they are disclosed. (W. Va.) *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 901.

3. **MONOPOLIES**—Subject of.—If a contract concerning an article of prime necessity would be illegal as in unreasonable restraint of trade, it is likewise illegal if its subject matter is any other article of legitimate trade or commerce. (W. Va.) *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 901.

4. **MONOPOLIES**—Effect of Contracts Creating.—If several contracts effectuate and consummate an arrangement, combination or trust in unreasonable restraint of trade tending to create a monopoly and against public policy, every contract whereby such combination or trust is effectuated and established is void and unenforceable between the parties, and the courts will refuse to assist them in enforcing its performance. (W. Va.) *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 901.

5. **MONOPOLIES** Embrace Any Combination the tendency of which is to prevent competition in trade in its broad and general sense, and to control prices to the detriment of the public. (W. Va.) *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 901.

6. **TRADE TRUSTS**—Definition.—A trade trust is a contract, combination, confederation or understanding, express or implied, between two or more persons, to control the price of a commodity or services for the benefit of the parties thereto, and to the injury of the public, and which tends to create a monopoly, and may be formed orally as well as in writing. (W. Va.) *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 901.

7. **MONOPOLIES** are Void as being in restraint of trade and against public policy. (W. Va.) *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 901.

8. **TRADE TRUSTS**—What Constitutes.—If the direct and necessary or natural effect of a contract or combination among producers and sellers of a commodity is to restrain competition and control prices to the injury of the public when all of the powers of the contract or combination shall have been exercised, it must be deemed as in unreasonable restraint of trade, against public policy, and void. (W. Va.) *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 901.

9. **TRADE TRUSTS and Monopolies—Defenses.**—It is no defense to the illegality of a contract or combination which is in unreasonable restraint of trade to show that in the particular case a complete monopoly has not been formed, or that no control of prices has been exercised, or that prices have been lowered and not raised. (W. Va.) *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 901.

10. **TRADE TRUSTS—Test of Legality.**—A contract which is charged to be in illegal restraint of trade is not to be tested by what has been done under it, but by what may be done under it, not by its performance, but by its powers of performance when fully exercised. (W. Va.) *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 901.

11. **TRADE TRUSTS—Illegality of Contracts or combinations** for the restraint of competition does not lie in the agreement not to compete, but in the reflex injury to the public. (W. Va.) *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 901.

12. **TRADE TRUSTS—Avoidance of Destructive—Competition.**—The public cannot compel competition, but the law in the interest of public policy can and will remove unreasonable restraints by contract upon competition in trade by refusing to enforce the contract and leaving the parties free to compete if they choose, and the fact that the purpose of a contract is to avoid destructive competition will not save it from illegality if it is in unreasonable restraint of trade. (W. Va.) *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 901.

13. **TRADE TRUSTS and Monopolies.**—It is not essential that a monopoly be complete before it is illegal, as an unreasonable restraint of trade which is only partial is illegal. (W. Va.) *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 901.

## MORTGAGES.

### *Deed as Mortgage—Future Advances.*

1. **DEED as Mortgage to Secure Future Advances—Recording.**—A deed absolute on its face but intended as a mortgage under a parol contract to secure future advances, is properly recorded in a book provided for the recordation of deeds, and such record is notice to subsequent purchasers or encumbrancers that such deed was merely security for future advances. (N. Dak.) *Merchants' State Bank v. Tufts*, 682.

2. **DEEDS or Mortgages Given to Cover Future Advances** are not fraudulent as matter of law. (N. Dak.) *Merchants' State Bank v. Tufts*, 682.

3. **DEEDS as Mortgage—Future Advances.**—A deed absolute in terms, but intended as a mortgage with a parol agreement for a reconveyance, is security for the present indebtedness, for which it was given, as well as for money advanced after the execution of the instrument in accordance with the parol contract that it should be security therefor. (N. Dak.) *Merchants' State Bank v. Tufts*, 682.

4. **DEED as Mortgage—Future Advances—Reconveyance.**—Before a grantor of a deed absolute on its face, but intended as a mortgage or mere security for present indebtedness and future advances can compel a reconveyance to him, he must pay the grantee all the indebtedness due him pursuant to the agreement made for such reconveyance. (N. Dak.) *Merchants' State Bank v. Tufts*, 682.

5. **DEED as Mortgage—Advances after Notice of Lien.**—A grantee in a deed absolute on its face, but intended as a mortgage

to secure a present debt and future advances based on a parol agreement, has no right to make further advances after actual notice that subsequent purchasers or encumbrancers have a lien on the land covered by the deed and taken without notice of such parol contract for all future advances. (N. Dak.) *Merchants' State Bank v. Tufts*, 682.

6. **DEED as Mortgage—Marshaling Securities.**—In an action to have a deed absolute on its face declared a mortgage, and for its foreclosure, in which judgment creditors are made defendants, if it appears that the grantee in the deed has other security for his debt, and the judgment creditors have the land only as security, a court of equity will, in a proper case, compel such grantee to exhaust his other security in the property not covered by the judgment lien. (N. Dak.) *Merchants' State Bank v. Tufts*, 682.

#### *Recording Laws.*

7. **RECORD OF MORTGAGES—Priority When Instruments Filed at Same Time.**—When two mortgages on the same land, executed to two different mortgagees, are filed for record at the same time by the common agent of the mortgagees, without instructions, the priority of liens is determined presumptively by the order in which the instruments are numbered in the register. (Minn.) *Wolf v. Edmonston*, 411.

8. **RECORDING LAWS—General Creditors.**—If a statute declares that a grant of real property absolute in form but intended to be defeasible, "is not defeated or affected as against any other person than the grantee or persons having actual notice, unless an instrument of defeasance duly executed and acknowledged shall have been recorded," the term "any other person" means any person otherwise entitled to the protection of the recording laws, such as subsequent purchasers or encumbrancers, and does not include general creditors who are not protected against an unrecorded defeasance. (N. Dak.) *Valley v. First National Bank*, 700.

See *Limitation of Actions*, 5-16.

#### *Note.*

**Mortgage to Secure Future Advances**, advances made under after notice of other liens, 691.

advances made under without notice of subsequent liens, 692.

agreement to make the advances, whether necessary, 695, 696.

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conflict between and other liens, 691.

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necessity for specifying the limit of the sum to be secured by, 695.

parol evidence to identify indebtedness to be secured by, 695.

subsequent liens, notice of dependent on the registry acts, 692.

subsequent liens, actual notice of, cases requiring, 693, 694.

summary of the law applicable to, 696.

validity of, general rule, 690.

validity of, when partly for past indebtedness, 691.

#### **MUNICIPAL CORPORATIONS.**

##### *Proof of Ordinances.*

1. **EVIDENCE—Proof of Ordinances.**—A book of ordinances purporting to be printed by authority of a municipal corporation is only

prima facie evidence of their passage. (Ill.) Chicago etc. Ry. Co. v. Wilson, 102.

2. **EVIDENCE—Proof of Ordinances.**—After a prima facie case of the passage and publication of an ordinance has been made out by introducing in evidence a book of ordinances purporting to have been printed by municipal authority, it is not sufficient to overcome such case to cast doubt or suspicion upon the validity of such ordinance, and to be successful its validity must be disproved by showing that, as a matter of fact, it was never passed. (Ill.) Chicago etc. Ry. Co. v. Wilson, 102.

*Street Cleaning—Delegation of Power.*

3. **MUNICIPAL CORPORATIONS—Control of Streets—Delegation of Power.**—A city council has absolute control over the city streets and power to keep them clean, but it cannot delegate such power to anyone, nor by ordinance or otherwise appropriate a portion of a street to the use and benefit of a private person. (Ill.) People v. Clean Street Co., 156.

4. **MUNICIPAL CORPORATIONS—Cleaning Streets—Delegation of Power.**—A municipal ordinance authorizing certain city officials to take such steps as they may deem effective to prevent the casting of waste paper and other litter upon the streets, to provide for the erection of suitable boxes for such litter and for cleaning such boxes, and to enter into any contract for a term not exceeding fifteen years, for the purpose of accomplishing such object, is void as an illegal delegation of power. (Ill.) People v. Clean Street Co., 156.

5. **MUNICIPAL CORPORATIONS—Cleaning Streets—Delegation of Power.**—A contract under a municipal ordinance giving a person full control and authority over the outside surface of street litter and waste boxes, to rent or sell it for advertising purposes to anyone he saw fit, at such prices as he chose, and to account to the city for a certain portion of the amount received is void, as an unlawful delegation of power and as turning over the exclusive use of portions of the street for the benefit of private individuals. (Ill.) People v. Clean Street Co., 156.

*Street Improvements and Contracts Therefor.*

6. **MUNICIPAL CORPORATIONS—Street Improvement.**—Under charters which give power to a city to impose, by special assessment upon abutting lots, the cost of a street improvement only upon competitive bids, cities have no power to adopt a patented pavement so controlled by a monopoly that there can be no competition, in the fair and reasonable meaning of the word. (Wis.) Allen v. City of Milwaukee, 54.

7. **MUNICIPAL CORPORATIONS—Street Improvement—Competitive Bids.**—Under a city charter giving the board of public works power, upon the authority of the common council, to make contracts for the use of any patent or patented article or process at a stipulated sum or royalty, and thereupon to order all work, whether chargeable to the city or to lots, to be done with such patented article, the approval of the council must be had of the acquirement of the right to use such patented article, and such charter provision does not dispense with competitive bidding as an essential to the scheme of paving streets at the expense of abutting lots. It nowhere authorizes the contract for the work to be made with a person who by reason of his patent can exclude all other bidders. (Wis.) Allen v. City of Milwaukee, 54.



**8. MUNICIPAL CORPORATIONS—Street Improvements—Void Contract.**—Under a charter providing that the board of public works shall have power, under authority of the common council, to make a contract with the patentee to use any patent or patented article, process, combination or work for the said city, at a stipulated sum or royalty for the use thereof, is contemplated the acquisition of a right to operate under a patent for a royalty, and then the letting of the actual work to the highest bidder, and the charter provision is not complied with by a contract with the patentee of a street pavement that an amount nearly equal to two-thirds of the whole cost of the paving should go to the patentee without competitive bidding, the patentee agreeing for the price paid to supply other material and do part of the work in making the improvement. (Wis.) *Allen v. City of Milwaukee*, 54.

*Injunction.*

**9. MUNICIPAL CORPORATIONS—Street Improvement—Void Contract—Injunction.**—If a city has entered into an invalid contract for the construction of a street improvement, and the invalidity is of a character likely to prejudice adjoining property owners in a manner or degree not readily separable from the burden which might be lawfully imposed upon them, they are entitled to enjoin the proceedings. (Wis.) *Allen v. City of Milwaukee*, 54.

**10. MUNICIPAL CORPORATIONS—Injunction.—Payment by City Officers** of money which the city does not owe may be enjoined at the suit of a taxpayer. (Wis.) *Allen v. City of Milwaukee*, 54.

*Authorizing Automobile Racing—Liability for Injuries.*

**11. MUNICIPAL ORDINANCE Authorizing the Racing of Automobiles, When Invalid.**—A special ordinance purporting to authorize specified persons to use a highway as a racecourse for automobiles on a particular occasion is invalid as a regulation of the speed of automobiles, and also because it is a participation by a city in the commission of an unlawful act, and an attempt to appropriate a public highway to a private purpose. (N. Y.) *Johnson v. City of New York*, 545.

**12. AUTOMOBILE RACE, Persons Injured at, When not Entitled to Recover of a Municipality Purporting to Authorize.**—Though a special ordinance purporting to authorize the use of a public highway at a time and place designated for a race between automobiles is invalid, and hence cannot authorize such use nor the racing of such automobiles at a rate of speed forbidden by law, yet one who goes to, and remains in the vicinity of, the highway solely for the purpose of witnessing the race cannot recover of the municipality enacting such ordinance for personal injuries resulting from an accident due to the high rate of speed of one of the participating automobiles. (N. Y.) *Johnson v. City of New York*, 545.

**NECESSARIES.**

See Husband and Wife.

**NEGLIGENCE.**

*Imputed Negligence.*

**1. NEGLIGENCE of Driver not Imputed to Passenger.**—Where a person employs a livery team with a driver to carry him to a

specified place, the relation of master and servant does not exist between the passenger and the driver, neither are they engaged in a joint enterprise. Therefore the negligence of the driver in driving over a railway track in front of an approaching train is not imputable to the passenger. The latter, however, is required to exercise reasonable care for his own safety. (Minn.) *Cotton v. Willmar etc. Ry. Co.* 422.

*Contributory Negligence.*

2. **NEGLIGENCE and Contributory Negligence.**—In an action based on negligence, if the evidence does not show any negligence on the part of the defendant, there can be no recovery, no matter how free from negligence the facts show the plaintiff to be. (Pa.) *Black v. Bessemer etc. R. R. Co.*, 766.

3. **NEGLIGENCE, CONTRIBUTORY**—Evidence of.—In an action to recover for the death of an employé resulting from an explosion caused by some unknown person tampering with steam appliances, evidence that the deceased had, on previous occasions, tampered with such steam appliances to hasten his work is inadmissible, if there is no evidence to connect the deceased with the act immediately causing his death. (Pa.) *Veit v. Class & Nachod Brewing Co.*, 757.

*Dangerous Premises.*

See Highways; Schools and School Districts.

4. **LAND OWNER, When Liable to a Person Injured on His Premises.**—If an owner employs brokers to lease his premises, and an agent of a broker takes an intending tenant to view the premises and directs him to go through a particular door or passageway, where, because of the darkness, he falls from the side of a stairway which is not protected by a balustrade or otherwise, a recovery against the owner may be sustained, where the accident was due to the unguarded condition of the stairway. (N. Y.) *Boyd v. United States Mtg. etc. Co.*, 599.

5. **AMUSEMENT RESORTS**—Liability of Keeper of.—Owners or proprietors of amusement resorts to which people generally are expressly or by implication invited to come are legally bound to exercise ordinary care and prudence in the maintenance and management of such resorts to the end of making them reasonably safe for visitors. (Utah) *Larkin v. Saltair Beach Co.*, 818.

*Liability of Proprietor of Bathing Resort.*

6. **AMUSEMENT PLACES**—Bathing Resorts—Liability of Proprietor of.—The proprietor or owner of a bathing resort is not only required to exercise ordinary care and prudence with respect to keeping the premises in a reasonably safe condition, but the law also imposes upon him the additional duty, where the character and conditions of the resort are such that because of deep water or the arising of sudden storms, or other causes, the bathers may get into danger of having in attendance some suitable person with the necessary appliances to effect rescues and save those who may meet with an accident. (Utah) *Larkin v. Saltair Beach Co.*, 818.

7. **AMUSEMENT PLACES**—Bathing Resorts—Liability and Duty of Owner of.—Not only is it the duty of owners of bathing resorts to be prepared to rescue those who may get into danger while in bathing, but it is also their duty to act with promptness, and make

every reasonable effort to search for, and if possible, rescue those who are known to be missing. (Utah) *Larkin v. Saltair Beach Co.*, 818.

**8. AMUSEMENT PLACES—Bathing Resorts—Liability of Owner—Negligence.**—An owner or proprietor of a bathing resort to which the public is invited, who maintains no notices indicating the depth of the water or other danger signals, nor any means for the rescue of bathers, and who, on being notified that a bather is in deep water and in danger of drowning and is missing, sends no one to search for him or give him relief, and does not try in any way to rescue him until several hours after such notice is given him, is guilty of negligence warranting a recovery for the death of such bather, especially when the latter is not guilty of contributory negligence. (Utah) *Larkin v. Saltair Beach Co.*, 818.

See Highways; Railroads; Street Railroads.

#### Note.

**Negligence**, arm or head projecting from a street-car, whether constitutes, 723.

arm or head projecting from the window of a railway car, cases illustrating the rules applicable to, 721-723.

arm or head projecting from the window of a railway car, whether constitutes, 721.

arm or head resting on the sill or window of a street-car, when does not constitute, 723.

by passengers on steam or street railways in riding with arm or head on, or projecting from, a window, 721-723.

contributory, burden of proof respecting, 115-117.

See Presumption of Due Care.

### NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

### NONSUIT.

See Dismissal and Nonsuit.

### NURSES.

See Physicians and Surgeons.

### OBSCENITY.

**INDICTMENT for Publishing Obscene Literature.**—An indictment charging that the accused, at a certain time and place, "unlawfully did have in his possession two hundred and twenty-one copies of a certain article of an indecent and immoral nature, to wit, a certain printed pamphlet of an indecent and immoral nature, entitled 'Circular Number One—A Biographical Sketch of a Few Short Skate Politicians,' for the purpose of giving away, exhibiting and publishing the said pamphlet, which said pamphlet is so indecent and immoral in its nature that the same would be offensive to the court and improper to be placed upon the records thereof," is sufficient, without setting forth a copy of the pamphlet. (Ohio St.) *State v. Zurhorst*, 724.

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**OFFICERS.**

**1. OFFICE AND OFFICERS—Property Right in Office.**—A public office is not to be regarded as the property of the incumbent, nor has he any property right therein. (Wyo.) State v. Grant, 982.

**2. OFFICE AND OFFICERS—Removal from Office.**—A state superintendent of a water division who is appointed by the governor with the consent of the senate is not exempt from removal from office except by impeachment, but is subject to a constitutional provision that all officers not liable to impeachment shall be subject to removal from office for misconduct or malfeasance therein in such manner as may be provided by law. (Wyo.) State v. Grant, 982.

**3. OFFICE AND OFFICERS—Removal from Office—Right to Notice and Hearing.**—If statutory power has been conferred upon the governor to remove an appointive officer having a definite term, and the statute does not provide the procedure, it will not be presumed that such removal may be made without notice and a hearing, but if the authority is expressly given to proceed summarily, no such notice is necessary. (Wyo.) State v. Grant, 982.

**4. OFFICE AND OFFICERS—Removal from Office—Right to Notice and Hearing.**—If statutory power is conferred upon the governor to remove an appointive officer, in language which is plenary, and upon filing his reasons therefor in writing with the Secretary of State, thus declaring the express conditions and limitations under which the governor may act in making such removal, the idea is precluded that there should be conditions or limitations not expressed, and the officer removed is not entitled to notice and a hearing prior thereto. (Wyo.) State v. Grant, 982.

**5. OFFICE AND OFFICERS—Judicial Officer—Impeachment.**—A state superintendent of water division appointed by the governor is not a judicial officer, so as to entitle him to the right not to be removed from office except by impeachment. (Wyo.) State v. Grant, 982.

See Sheriffs and Constables; State.

**ORDINANCES.**

See Jurisdiction; Municipal Corporations, 1-2.

**PASSENGERS.**

See Carriers.

**PASTURING CATTLE.**

See Animals.

**PERPETUITIES.**

**1. PERPETUITIES, Construction of Will is Against.**—It is the duty of courts to give the language used by the testator such a construction as will make the testament or limitation valid if it can be done in conformity with well-settled rules, or with his manifest intent. (N. Y.) Mee v. Gordon, 613.

**2. PERPETUITIES.**—If an Interest Begins Within, It may be Extended Beyond, the Time Prescribed in the rule against perpetuities. (Mass.) Gray v. Whittemore, 246.

**3. PERPETUITIES.**—A Trust to Pay Income to the Sons and Daughters of the Testator Who Shall Survive Him, During Their Lives, and on the Death of Either, Then to His or Her Surviving Spouse so long as he or she remains unmarried, does not offend the rule against perpetuities. (Mass.) Gray v. Whittemore, 246.

**4. PERPETUITIES.**—A Trust to Pay Income to the Sons and Daughters of the Testator for Life, and after the death of any of them leaving no surviving spouse, then to the children of such deceased son or daughter, is valid. (Mass.) Gray v. Whittemore, 246.

**5. PERPETUITIES.**—A Remainder Limited upon Two Distinct Events, One of Which Must Happen Within, and the Other may Happen Beyond, the time prescribed by the rule against perpetuities is good as to the former. (Mass.) Gray v. Whittemore, 246.

**6. PERPETUITIES.**—A Trust to Pay Income, upon the death of testator's children, to the issue of such as leave no surviving spouse, and as to those who leave a surviving spouse, then upon the marriage or death of such surviving spouse, to the issue of such spouse and of the child of the testator, is not within the rule against perpetuities as to the issue of such decedent's children as die leaving no surviving spouse, but as to the other class, is within such rule, because it may happen that the death of one of such surviving spouses may be more than twenty-one years after the termination of all lives in being when the trust was created. (Mass.) Gray v. Whittemore, 246.

**7. PERPETUITIES.**—A Gift or Grant Must Take Effect Within the Period Prescribed to escape the rule against perpetuities; it is not sufficient that it may take effect within that time. (Mass.) Gray v. Whittemore, 246.

**8. PERPETUITIES.**—Remainders Which Necessarily Vest Within the Time Prescribed, Though the Actual Payment or Transfer to the Beneficiary is Postponed to a Later Period, are valid. (Mass.) Gray v. Whittemore, 246.

**9. PERPETUITIES.**—Interests Which Vest Absolutely or Contingently Within Lives in Being.—If a trust is created by a testator to pay the income to his children for their lives, and on the death of any son, to his widow for her life, and upon the death of any daughter, to her surviving husband for life, and upon the death of any child of the testator leaving no surviving widow or husband, or the death of any surviving husband, or death or the marriage of any such widow, to transfer a proportionate share to the issue, if any, of his deceased son or daughter, and in case of default of such issue at the time of such decease or marriage, to pay or transfer such share to the heirs at law of such deceased son or daughter, the issue of the children of the testator take their interest at or before the death of their parents, and whether such interest be regarded as absolute or as contingent upon the death of the surviving husband or wife of their respective parents, then their interests must necessarily vest within the time allowed by the rule against perpetuities. (Mass.) Gray v. Whittemore, 246.

## PHOTOGRAPHS.

See Contracts, 2; Injunction, 4.

## PHYSICIANS AND SURGEONS.

**1. PHYSICIANS AND SURGEONS.**—Negligence of Nurse.—A Trained Nurse in a Sanitarium must exert her best endeavors to avoid

mistakes of any kind in relation to a patient who is under the care of the sanitarium, and as to whom the physician in charge thereof must exercise due care to see that medicines are properly administered. (La.) *Stanley v. Schumpert*, 202.

2. **PHYSICIANS AND SURGEONS—Negligence of Nurse.**—The functions of a trained nurse are sufficiently important to render her and her employer liable in damages for negligently inflicting pain upon a patient in their charge and under their care. (La.) *Stanley v. Schumpert*, 202.

### PLEADING.

1. **PLEADING—Amendment of Complaint by Changing the Capacity in Which the Defendant is Sued.**—In an action to recover for negligence in which the defendant is described "as trustee under the will of M. B., deceased," the court may authorize an amendment of the complaint and summons by striking out the words "as trustee," etc., and thus convert the action into one against the defendant personally. (N. Y.) *Boyd v. United States Mtg. etc. Co.*, 599.

2. **PLEADING, Amendment of Complaint, When not Deemed to Bring in a New Party.**—If the original complaint and summons are amended to change the action from one against the defendant as trustee to one against him personally, this does not bring in a new party in the sense of making one a defendant who was not such before. (N. Y.) *Boyd v. United States Mtg. etc. Co.*, 599.

See Equity, 3.

### PLUMBERS.

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### POLICE POWER.

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## PRIVACY, RIGHT OF.

See Contracts, 2.

## PRIVATE WAYS.

**1. PRIVATE WAYS, Who may Recover for Injuries Due to a Nuisance upon.**—A woman passing over a private way to reach a house thereon occupied by her dressmaker has the same right as an abutter on such way to recover for injuries due to an accumulation on the highway resulting from the manner in which another abutter has constructed and maintained his house so as to create a nuisance on such highway by the accumulation of ice thereon. (Mass.) *Cavanagh v. Block*, 220.

**2. PRIVATE WAYS, Property Owners' Duties as to Ice and Snow.**—It is the duty of a lot owner not to erect a house so near a private way or to construct gutters to discharge the water that accumulates on his roof upon the way in such a manner as to make a dangerous accumulation of ice or water which will make the way unsafe for travel. (Mass.) *Cavanagh v. Block*, 220.

**3. PRIVATE WAYS, Liability of Abutting Lot Owner for Accumulation of Ice.**—The owner of a house abutting on a private way which is not part of his premises by constructing and maintaining eaves, gutters, and conductors on such house in so improper and negligent a manner as to cause a dangerous accumulation of ice in front of his house on the part of the way fitted for travel is answerable to a person lawfully traveling on the way and exercising due care who is injured by his falling caused by the ice so accumulated. (Mass.) *Cavanagh v. Block*, 220.

## PROCESS.

**1. PROCESS—Constructive Service on Residents.**—A statute is valid which authorizes the service of process by publication and mail in an action on the case against a railroad company whose principal office is in the state, but outside the county where the injury occurred, and when the suit is brought and the sheriff makes return upon the summons that the defendant company has no officer or agent in such county upon whom process could be served. (Ill.) *Nelson v. Chicago etc. R. R. Co.*, 133.

**2. CONSTITUTIONAL LAW—Process—Constructive Service on Residents.**—A statute providing for a constructive service of process by publication and mail in lieu of actual service, in a case where process cannot be actually served upon the defendant in the county where the statute expressly authorizes the suit to be begun, even though the defendant resides and is in the state, is constitutional and valid, and such service constitutes due process of law. (Ill.) *Nelson v. Chicago etc. R. R. Co.*, 133.

**3. PROCESS—Constructive Service on Residents—Personal Judgment in an action at law may be rendered against a defendant resid-**

ing in and who is in the state where the suit is pending, who has been notified of its pendency by constructive service of process, where it appears that actual service of process could not be had, and the constructive service provided for was required to be made in such manner that the reasonable probabilities were that the defendant would receive notice of the pending action before judgment. (Ill.) *Nelson v. Chicago etc. R. R. Co.*, 133.

### PUBLIC LANDS.

1. **PUBLIC LANDS—Grazing Rights upon.**—Under an implied license from the United States government, the public lands are free to everyone who may seek to use them for grazing or pasturing livestock, so long as they are unappropriated and not expressly reserved or set apart for other public purposes. (Wyo.) *Healy v. Smith*, 1004.

2. **PUBLIC LANDS—Grazing Rights upon—Prior Occupancy.**—The United States government has never been a party to any arrangement, tacit or otherwise, between stock-growers in the matter of range rights, or the occupation of the public lands, and at no time has it recognized the right or claim of any person, or number of persons, to the exclusive use of the public lands for grazing or other purposes, on account of prior occupancy or otherwise. So far as the government is concerned, the theory at all times prevails that the vacant public lands are public commons, free to the use of all citizens alike. (Wyo.) *Healy v. Smith*, 1004.

3. **PUBLIC LANDS—Right to Graze Sheep Thereon.**—By merely grazing a herd of sheep under the charge of a herder upon vacant public lands, the owner of the herd does not usurp the exclusive use or possession thereof, in the sense, at least, in which exclusive use or possession of the public domain is declared or held unlawful or opposed to public policy, and in the absence of statutory provision or other governmental regulation to that effect, there is no authority for confining the privilege of grazing upon the public lands to animals running at large, and denying that privilege to sheep under the control of a herder. (Wyo.) *Healy v. Smith*, 1004.

4. **PUBLIC LANDS—Right to Graze—Watering Places.**—The fact that nearly the entire available water supply for the watering of livestock is situated upon small holdings of private lands within a large territory, containing large bodies of public lands, constitutes a ground for an injunction restraining nonland-owning owners of sheep or other livestock from grazing the vacant public lands within the territory in question. (Wyo.) *Healy v. Smith*, 1004.

5. **PUBLIC AND PRIVATE LANDS—Water Supply—Right to Graze.**—Persons who have the right to graze their sheep on public lands have no right to willfully and knowingly direct or drive their sheep upon private lands, although they are uninclosed, and may contain the only available or most convenient water supply in a particular neighborhood. (Wyo.) *Healy v. Smith*, 1004.

### PUBLIC OFFICE.

See Officers.

### QUIETING TITLE.

**QUIETING TITLE—Mode of Relief.**—If, in a suit to quiet title, it appears that attorneys have improperly and illegally acquired

title to the land of their client, and that the purchaser from them knew all of the facts and the manner in which they acquired such title, he is not altogether an innocent purchaser, and should be required to settle with the client, instead of his grantors, for the purchase price of the land, and derive his title through such settlement. (Mo.) *Bucher v. Hohl*, 492.

### QUITCLAIM DEED.

See Deeds.

### RAILROADS.

#### *Injury to Crossings.*

1. **RAILROADS—Negligence—Duty to Look and Listen.**—Generally, travelers are guilty of negligence if, before going upon railroad crossings, they fail to look and listen for the approach of trains, but if the circumstances in a particular case are such that an ordinarily prudent person might not expect a train to pass at that moment, it is a question for the jury as to whether or not he was guilty of contributory negligence in failing to stop, look and listen. (Ark.) *Scott v. St. Louis etc. Ry. Co.*, 67.

2. **RAILROADS—Contributory Negligence—Failure to Look and Listen.**—If a person approaching a spur railroad track in daylight sees a train standing on such track and then crosses to the main track, where he is struck by a car, which, unknown to him, has been cut out from the train on the spur track and is being "kicked" on the main track, the question as to whether or not he is guilty of contributory negligence in failing to look and listen before going upon the main track is one of fact for the jury to determine. (Ark.) *Scott v. St. Louis etc. Ry. Co.*, 67.

3. **RAILROADS—Injury at Crossings—Presumption of Care.**—If a person on the highway is killed on a railroad crossing at night without any eye-witnesses to the accident, by a locomotive running backward at a rate of thirty miles per hour without displaying any light that would throw light ahead, and without giving the statutory signals, there is no presumption that the person killed failed to stop, look and listen, or that he was guilty of contributory negligence. (Mich.) *Schremms v. Pere Marquette R. R. Co.*, 291.

4. **EVIDENCE—Exercise of Due Care.**—If there is no eye-witness to a fatal accident at a railway crossing, evidence that the deceased was a woman of careful habits is competent as tending to show that she was at the time in the exercise of due care. (Ill.) *Chicago etc. Ry. Co. v. Wilson*, 102.

5. **EVIDENCE—Exercise of Due Care.**—Evidence of the careful habits of a person killed at a railroad crossing is not rendered incompetent by the subsequent testimony of the train engineer that he saw he deceased when she was within a few feet of the track; that upon sounding the alarm she stopped; that he did not know of her being struck, did not stop his train, and only heard of the fatal accident the next morning. (Ill.) *Chicago etc. Ry. Co. v. Wilson*, 102.

#### *Signals at Crossings.*

6. **RAILROAD CROSSING—Evidence of Absence of Signals.**—When it is alleged that the bell on a locomotive was not rung as the train approached a crossing, the testimony of witnesses, who were present and listening for signals, that they did not hear it ring,

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is sufficient to take the issue to the jury, although other witnesses declare that the bell did ring. (Minn.) *Cotton v. Willmar etc. Ry. Co.*, 422.

**7. RAILROADS—Overhead Crossings—Duty as to Signals.**—If the risks and dangers of a railroad crossing at grade have been avoided by the construction of an overhead crossing, there is no imperative, unbending rule requiring the performance of duties, such as to ring a bell or blow a whistle upon approaching the crossing, demanded where the danger is greater, as at such grade crossing. (Pa.) *Black v. Bessemer etc. R. R. Co.*, 766.

**8. RAILROADS—Overhead Crossings—Duty as to Danger Signals.**—If a traveler approaching an overhead railway crossing has a clear view of the railroad for a distance of fifteen hundred feet in the direction from which a train is approaching, the railroad company does not owe him the duty of giving danger signals of the approach of its train. (Pa.) *Black v. Bessemer etc. R. R. Co.*, 766.

*Liability for Materials and Supplies.*

**9. RAILROADS—Lien on for Materials, Hay and Grain.**—A statute giving a lien on railroads for materials furnished has reference to materials furnished for use in the construction of the road so as, in a sense, to become a part of it, and does not include hay, grain and straw furnished a contractor for keeping teams employed by him in working on the road. (Ohio St.) *Pennsylvania Co. v. Mehaffey*, 746.

**10. RAILROADS—Liability for Supplies Furnished Contractor.** A notice posted by a railroad company, at a point where construction work is being done on its road, that it will "protect all claims for materials, labor and board," does not include a claim for hay, grain, straw and feed furnished a contractor for teams employed by him in the work. (Ohio St.) *Pennsylvania Co. v. Mehaffey*, 746.

See Carriers; Contracts, 6.

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**Railway Corporations**, ejection to recover property occupied as right of way by, 586.

**Railways**, accident at crossing of, presumption as to due care, 121-123  
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**RAPE.**

*Carnal Knowledge of Minor.*

**1. RAPE—Carnal Knowledge of Infant—Different Acts—Distinct Offenses.**—Each act of carnal intercourse with a female under the age of fourteen years constitutes a separate, distinct and substantive offense. (Mo.) *State v. Palmberg*, 476.

**2. RAPE—Carnal Knowledge of Infant—Evidence of Prior Acts.** Evidence of acts of intercourse occurring prior to the act for which the accused is being tried is admissible as tending to prove the particular act upon which the conviction is sought. (Mo.) *State v. Palmberg*, 476.

**3. RAPE—Carnal Knowledge of Infant—Evidence of Subsequent Acts.**—Evidence of acts of intercourse with a female under fourteen years of age occurring subsequently to the act for which the accused is being tried is inadmissible. (Mo.) *State v. Palmberg*, 476.

**4. RAPE—Carnal Knowledge of Infant—Several Acts of Intercourse—Election.**—If, in a prosecution for carnal intercourse with a female under fourteen years of age, the prosecutrix testifies to several distinct acts of intercourse occurring prior to her arriving at that age, the prosecution must, at the close of its case, on motion of the defense, elect upon which act of intercourse it will rely, and its failure to do so is reversible error. (Mo.) *State v. Palmberg*, 476.

**5. RAPE—Carnal Knowledge of Infant—Several Acts of Intercourse—Time of Election.**—If, at the commencement of the trial of a prosecution for carnal intercourse with a female under fourteen years of age, the prosecution knows that the testimony will show several acts of intercourse, each constituting a separate offense, it should inform the accused upon what particular act it will rely for a conviction, but evidence of prior acts should then be admitted, although evidence of subsequent acts must be excluded. (Mo.) *State v. Palmberg*, 476.

**6. RAPE—Carnal Knowledge of Infant—Exhibition of Child.**—On a prosecution for carnal intercourse with a female under fourteen years of age, the child to which the prosecutrix claims she gave birth as the result of her intercourse with the defendant may be exhibited to the jury. (Mo.) *State v. Palmberg*, 476.

**7. RAPE—Carnal Knowledge of Infant—Evidence of Date of Birth.**—If, on a prosecution for carnal intercourse with a female under fourteen years of age, the testimony of a physician tends to establish that he attended the mother of the prosecuting witness at the time of the birth of the latter, and he is enabled, by refreshing his memory from a memorandum-book, to reasonably fix the date of such birth, his testimony is admissible. (Mo.) *State v. Palmberg*, 476.

**8. RAPE—Carnal Knowledge of Infant—Duty to Make Complaint.**—On a prosecution for the carnal knowledge of a female under fourteen years of age, an instruction as to her duty to make complaint of her ravishment has no application. (Mo.) *State v. Palmberg*, 476.

*Indictment—Election Between Counts.*

**9. INDICTMENT FOR RAPE—Election Between Count.**—If, upon the trial of a person over eighteen years of age for rape upon a female under sixteen, the indictment, in the first count, charges the offense to have been committed with her consent, and, in the second count, forcibly and against her will, it is not error for the court to overrule a motion by the defendant at the conclusion of the state's evidence in chief to require the state to elect upon which count it will rely. But it is error to charge that the jury may find a general verdict of guilty upon both counts, if they find the evidence of such character as to warrant a conviction upon either count. (Ohio St.) *State v. Hensley*, 734.

## RECEIVERS.

**PRACTICE, Parties to Suit to Recover Property for the Benefit of Creditors Where a Trustee or Receiver Has Been Appointed in Supplemental Proceedings.**—If judgments have been recovered against

one for whose benefit property is held under a trust invalid as against his creditors, and a receiver is afterward appointed in proceedings supplemental to execution issued upon such judgments, this appointment does not set aside the lien of the judgments nor prevent such creditors from maintaining suit to reach such property and appropriate it to the payment of their judgments. (N. Y.) *Ullman v. Cameron*, 553.

### RECORDS.

**1. REGISTRATION OF TITLE—Torrens System—Publication of Summons.**—When the name of a claimant to land is known to an applicant for registration of title, either from the report of the examiner or other sources, the summons cannot be served on such claimant by publication unless his name appears in the summons. (Minn.) *Baart v. Martin*, 394.

**2. REGISTRATION OF TITLE—Torrens System—Indefeasible Title.**—The purpose of the Minnesota Torrens law is to create an indefeasible title in the person adjudged to be the owner, and in the absence of fraud the decree is final, unless reversed or modified as authorized by the statute. (Minn.) *Baart v. Martin*, 394.

**3. REGISTRATION OF TITLE—Torrens System—Effect of Fraud.**—If the registration of title to land under the Torrens system is obtained by fraud, the decree and the certificate of registration issued thereunder may be vacated and set aside, unless a bona fide purchaser has secured rights on the faith of the record, notwithstanding the statute contains no express exception in case of fraud. (Minn.) *Baart v. Martin*, 394.

**4. REGISTRATION OF TITLE—Torrens System—Effect of Fraud.**—If the registration of a title has been procured by fraud, the defrauded party, if not guilty of laches, may attack the decree so long as the land stands registered in the name of the party guilty of the fraud. (Minn.) *Baart v. Martin*, 394.

See Mortgages, 7-8.

### REPLEVIN.

**REPLEVIN—Allegation of Ownership.**—In an action to recover personal property the complaint must show the ultimate fact that the plaintiff was the owner or entitled to the possession of the property at the time of the commencement of the suit, and it is not sufficient to merely aver that he was the owner or entitled to the possession at some period, even one day, prior to that time. (Utah) *Manti City Savings Bank v. Peterson*, 862.

### RES JUDICATA.

See Judgments, 3-5.

### RESTRAINT OF TRADE.

See Monopolies.

Note.

**Robbery**, difference between and extortion, 449, 450.

### ROGUES' GALLERY.

See Injunction, 4.

**SALES.**

**1. SALES—Acceptance of Goods—Estoppel.**—If, in an action to recover the price of lumber, it appears that the buyer had knowledge several days before its arrival that it had been ordered in his name, and on its arrival he was notified thereof, and that it was billed in his name, and he then ordered it turned over to the person for whom it was ordered, but several months thereafter disclaimed having ordered it at all, it is a question for the jury whether under such facts his acts constitute an acceptance of the lumber so as to bind him for its price, and whether he is estopped to deny such acceptance, although it does not appear except by inference that he had knowledge that an order for the lumber had been given. (Mich.) *Lomb Bell Lumber Co. v. Nyman*, 310.

**2. SALE—Warranty of Quality not a Separate Contract.**—On the sale of personal property a warranty of its quality is not a separate and independent contract, but one of the terms of the contract of sale. (Minn.) *McNaughton v. Wahl*, 389.

**3. SALE—Parol Evidence of Warranty.**—Where, in the absence of fraud or mistake, the written contract for the sale of personal property is complete in itself, but silent upon the subject of warranty, oral evidence is not admissible to show a warranty of quality. (Minn.) *McNaughton v. Wahl*, 389.

**4. SALES—Breach of Contract—Notice of Intent to Resell.**—If, after the vendee's breach of a contract to purchase goods, they are resold to him at a reduced price, no notice to him of an intention to resell is necessary, in order to entitle the vendor to recover the difference between the contract price and the price received on the resale. (Ark.) *Arkansas etc. Grain Co. v. Young etc. Grain Co.*, 99.

**5. SALES—Waiver of Breach of Contract.**—If, under a contract for the purchase of corn to be delivered to a carrier for transportation to the vendee, the vendor's liability was to cease when the corn was delivered in good condition to the carrier and he was not thereafter to become liable for loss if the corn became heated, the fact that he granted permission to the vendee to inspect the corn at its destination before acceptance does not amount to a waiver of his right to claim damages for the wrongful rejection of the corn by the vendee on the ground that it became heated after delivery to the carrier. (Ark.) *Arkansas etc. Grain Co. v. Young etc. Grain Co.*, 99.

**6. SALES—Waiver of Breach—Resale.**—If, after a vendee has committed a breach of his contract to purchase goods, the agent of the vendor resells them to him at a reduced price, the vendor does not thereby waive the right to claim as damages the difference between the contract price and the price received on the resale. (Ark.) *Arkansas etc. Grain Co. v. Young etc. Grain Co.*, 99.

See Bailment; Constitutional Law, 7-8.

**SCHOOLS AND SCHOOL DISTRICTS.**

**1. BOARDS OF EDUCATION, Liability of for Acts of Subordinates.**—The doctrine of respondeat superior does not apply to a municipal board of education, and it is not responsible for any of the acts of its subordinates. (N. Y.) *Wahrman v. Board of Education*, 609.

**2. BOARDS OF EDUCATION, Liability of for Permitting Dangerous Building to be Occupied for School Purposes.**—A board

of education, knowing one of the school buildings to be out of repair and dangerous, is liable to a pupil of one of the public schools who is injured by the falling of plastering from the ceiling, for the liability is not founded on the negligence of the board or its subordinates in not repairing the building, but on the ground that such board negligently permitted the building to be occupied for school purposes with knowledge of its dangerous condition. (N. Y.) *Wahrman v. Board of Education*, 609.

### SETOFF AND COUNTERCLAIM.

1. **COUNTERCLAIM, When Must Have Accrued Before the Commencement of the Action.**—If an action is brought on a promissory note in the name of an indorsee, and is, after his death, prosecuted by his administrator or executor, the defendant cannot have the benefit as a counterclaim or as an equitable defense of a note purchased after the commencement of the action. (Mass.) *Jump v. Leon*, 265.

2. **COUNTERCLAIM Where the Plaintiff Has not a Beneficial Interest.**—If an action is brought on a promissory note transferred to the plaintiff but in which he has no beneficial interest, the defendant may maintain a counterclaim against the person who is the beneficial owner of such note. (Mass.) *Jump v. Leon*, 265.

3. **COUNTERCLAIM Against Notes Held in the Name of an Estate.**—If, after the bringing of an action on a promissory note by a person holding the legal title, but having no beneficial interest, the holder of the beneficial interest dies and his executor is appointed, the defendant cannot maintain a counterclaim on unmatured notes against such beneficial interest, though the estate is probably insolvent, if the executrix has not represented it to be insolvent and a year has not elapsed since his appointment. (Mass.) *Jump v. Leon*, 265.

See *Mechanics' Liens*, 7.

### SHERIFFS AND CONSTABLES.

1. **CONSTABLES—Bonds—Liability of Sureties.**—If a constable is acting under color or by virtue of his office at the time he commits an assault or other wrongful act, his bondsmen are liable; but if, on the contrary, at the time of the commission of such wrongful act, there was no connection between it and his official capacity or line of duty, his bondsmen are not liable. (Ill.) *Greenberg v. People*, 127.

2. **CONSTABLES—Assault—Liability of Sureties.**—If a constable makes an assault upon the wife of an execution debtor to prevent her from assisting her husband in preparing a schedule of property levied upon, and out of which he is entitled to claim an exemption, the sureties upon such constable's bond are liable in damages. (Ill.) *Greenberg v. People*, 127.

### SPECIFIC PERFORMANCE.

**SPECIFIC PERFORMANCE Based on Title by Prescription.**—Specific performance is properly decreed, though the title of the complainants is based on adverse possession only and must be proved by parol evidence, as where they and their predecessors have held such possession for thirty-eight years, during which time no other person has made any claim of ownership in the premises. (N. Y.) *Freedman v. Oppenheim*, 595.



**SPITE FENCE.**

Adjoining Land Owner.

**STALE CLAIMS.**

See Equity, 4.

**STATE.**

**1. ESTOPPEL Against State—Acts of Defaulting Public Officer.**—A state is not estopped by the illegal acts of its unfaithful and defaulting public officer. (La.) *State v. Jahraus*, 208.

**2. PUBLIC OFFICERS—Liability of State for Acts of.**—A state is not liable for wrongs or negligence committed by its public officers. (La.) *State v. Jahraus*, 208.

**STATUTE OF FRAUDS.**

See Frauds, Statute of.

**STATUTE OF LIMITATIONS.**

See Limitation of Actions.

**STATUTES.**

**STATUTES—Implied Exceptions.**—The General Terms of a statute are subject to implied exceptions founded in the rules of public policy and the maxims of natural justice, so as to avoid absurd and unjust consequences. (Minn.) *Baart v. Martin*, 394.

**STREET RAILROADS.**

**1. STREET RAILWAYS—Right to Use Track—Contributory Negligence.**—The track of a street railway is open for use by those riding in vehicles, as the space between the rails is paved for that purpose, and their right to use this part of the track is subordinate only to the right of the railway company to have a clear track. Those in vehicles are expected to use such track both from necessity at times, and for convenience when it offers the better passageway, and one using it for convenience cannot be charged with negligence simply because he could have driven at the sides of the street. Under such circumstances, the question whether he exercised proper care or not is for the jury to determine. (Pa.) *Barto v. Beaver Valley Traction Co.*, 770.

**2. STREET RAILWAYS—Care Toward Dogs on Track.**—When dogs are fighting on a street railway track, apparently oblivious to an approaching car, the motorman, upon discovering their peril, should take reasonable precautions, by giving signals or checking the speed of the car, to avoid injury to them. If he fails to exercise such care, the railway company is answerable for injuries sustained by the animals. (Minn.) *Harper v. St. Paul City Railway Co.*, 415.

See Carriers.

**Note.**

**Street Railways**, projecting an arm or head beyond the windows of, whether constitutes negligence, 723.

**Streets and Highways**, ejection to recover, 580-583.

**STRIKES.**

See Trade Unions.

**SUMMONS.**

See Process.

**TAXATION.***Situs of Personality.*

1. **TAXATION—Situs of Personality.**—The rule “*mobilia sequuntur personam*” is a fiction of law not resting of itself upon any constitutional foundation, and it gives way before express law destroying it in any given case, where constitutional requirements do not stand in the way. (La.) *Metropolitan Life Ins. Co. v. Board of Assessors*, 179.

*Foreign Corporations.*

2. **CORPORATIONS, FOREIGN—Taxation of.**—Investments made by a foreign corporation within the state are subject to taxation under its laws when made by a resident agent of the corporation employed for that purpose, and at whose office within the state, loans are made payable, and to whom the notes taken for loans are returned for collection. (La.) *Metropolitan Life Ins. Co. v. Board of Assessors*, 179.

3. **CONSTITUTIONAL LAW—Taxation of Foreign Corporations.** A statute providing for the state taxation of credits arising out of loans made in the regular course of business therein by the local agent of a foreign insurance corporation to its policy-holders is constitutional and valid, where the loans are negotiated, the notes signed, the security taken and the interest and loans collected within the state, although the notes which are evidence of the loans and credits are kept at the home office of the corporation at all times when not needed in the state. (La.) *Metropolitan Life Ins. Co. v. Board of Assessors*, 179.

4. **CORPORATIONS, FOREIGN—Taxation.**—A state may tax a foreign insurance corporation to any extent or in any manner it sees proper, as a condition precedent to its doing business within the state. (La.) *Metropolitan Life Ins. Co. v. Board of Assessors*, 179.

*Compulsory Payment.*

5. **TAXES.—To Warrant a Recovery of Taxes Paid Under Protest.** the element of coercion must be found. In the absence of actual, present and potential compulsion, payment under protest is not sufficient. (Minn.) *Oakland Cemetery Assn. v. County of Ramsey*, 377.

6. **TAXES—Compulsory Payment in Order to Record Deed.**—One who by force of a statute is unable to place on record a deed by which he has acquired title to land, by reason of illegal taxes charged upon the property, may pay them in order to secure the recording of his deed, without the payment being deemed voluntary. In such a case, if he pays the taxes under protest, he may recover them in a subsequent action. (Minn.) *Oakland Cemetery Assn. v. County of Ramsey*, 377.

*Tax Sales and Titles.*

7. **TAX TITLES—Necessity of Delinquent Tax List.**—There must be a delinquent tax list before there can be a valid sale of land

for delinquent taxes and a valid deed thereto. (W. Va.) Metz v. Starcher, 925.

**8. TAX TITLES—Delinquent List as Evidence.**—The delinquent tax list is not only the evidence of delinquency, but it is also the record notice of delinquency to the owner of the land. (W. Va.) Metz v. Starcher, 925.

**9. TAX TITLES—Delinquent List—Sufficiency of.**—A paper not purporting to be a delinquent tax list, and not containing the heading required therefor or other sufficient heading, and containing no means of identifying as a delinquent tax list to an ordinary person is not sufficient, and a tax sale and deed based thereon may be avoided by the owner of the land sold. (W. Va.) Metz v. Starcher, 925.

**10. TAX SALES.**—A Purchaser of a Tax Title may be required to protect his interest, not only as against all subsequent taxes, but also against anterior ones. (Minn.) Oakland Cemetery Assn. v. County of Ramsey, 377.

**11. TAX SALES—Priority of Titles.**—A Tax Title based on a sale under a later tax may prevail over a later tax sale on an earlier tax lien. (Minn.) Oakland Cemetery Assn. v. County of Ramsey, 377.

See Tenancy in Common.

**Note.**

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See Evidence, 4-7.

**TENANCY BY ENTIRETIES.**

See Divorce, 2-4; Husband and Wife, 6.

**TENANCY IN COMMON.**

**1. COTENANCY—Adverse Possession by Grantee of One Cotenant.**—Where one tenant in common conveys the entire property, and his grantee records the deed, enters into possession of the land, and holds it adversely for the statutory period, he acquires a good title as against the other cotenant, who was aware of such posses-

sion but not of the existence of the deed. (Minn.) *Sanford v. Sanford*, 432.

2. **COTENANCY.—The Rule that the Purchase of a Tax Title** by one tenant in common inures to the benefit of all, and that the purchaser is entitled to remuneration only, is based upon a community of interest in a common title creating such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other in reference to the property so situated. (Minn.) *Hoyt v. Lightbody*, 358.

3. **COTENANCY—Assertion of Adverse Tax Title.**—One who, after purchasing an undivided interest in land, buys tax certificates thereto based on sales made prior to his purchase of the land, and who perfects the certificates by elimination of the right of redemption, cannot assert the resulting tax titles adversely to his cotenant. (Minn.) *Hoyt v. Lightbody*, 358.

4. **COTENANCY—Acquisition of Tax Title.**—The Statute of Minnesota permitting the holder of an undivided interest to redeem his estate by paying into the treasury a proportionate amount of the taxes required to redeem the whole, does not necessarily abrogate the general prohibition against the acquisition of a tax title by one cotenant adversely to another. (Minn.) *Hoyt v. Lightbody*, 358.

5. **COTENANCY—Tax Title—Quitclaim Deeds.**—If cotenants, one of whom is a minor, execute a quitclaim deed to certain land, against which at the time there are several outstanding tax titles which the grantee afterward acquires, and then conveys the land by warranty deed, the last grantee is not estopped to deny as against such minor cotenant, upon his becoming of age, his contention that his deed executed during his minority was ineffective as the relation of cotenants existed between him and his grantee, whose purchase of the outstanding titles inured to his benefit. Such outstanding titles having originated through no default of such grantees, at a time when no relation existed between them and such cotenant requiring either, as to the other, to pay the taxes, the quitclaim deed did not create any such relation. (Mich.) *Olmstead v. Tracy*, 299.

See Divorce.

Note.

Tenancy in Common. See Tax Title.

## TORRENS LAND ACT.

See Records.

## TRADE UNIONS.

1. **LABOR UNIONS, General Right to Form, and to Strike.**—Laborers have the right to organize into labor unions to promote their welfare, and a labor union has a general right to strike. (Mass.) *Pickett v. Walsh*, 272.

2. **A LABOR UNION is Limited in What It can Lawfully do** by the existence of the right in every other citizen to pursue his calling as he thinks best. (Mass.) *Pickett v. Walsh*, 272.

3. **LABOR UNIONS AND STRIKES.**—The Test of What is Lawful for an Individual is not always the test of what is lawful for a

combination of individuals. There are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do. (Mass.) *Pickett v. Walsh*, 272.

4. **LABOR UNIONS—Unlawful Combinations.**—The members of a labor union cannot by a strike refuse to work with other workmen, for an arbitrary cause. (Mass.) *Pickett v. Walsh*, 272.

5. **LABOR UNION, Strike by to Compel Discharge of Persons not Belonging to the Union and to Obtain Employment for Themselves.**—A strike by bricklayers and masons to refuse to lay brick and stone where the work of pointing is given to others, and thereby to compel such work to be given to such bricklayers and masons, is not unlawful. (Mass.) *Pickett v. Walsh*, 272.

6. **STRIKE, When Unlawful.**—A Strike by a Labor Union Against A, with Whom It Has No Dispute, Because He Works for B, with Whom It Has a Dispute, for the purpose of forcing A to force B to yield to the strikers' demand, is not justifiable. Organized laborers' right to coercion and compulsion is limited to strikes against persons with whom the organization has a dispute. (Mass.) *Pickett v. Walsh*, 272.

7. **LABOR UNIONS, Liability of Members of.**—A defendant is liable for an intentional and unjustifiable interference with the pursuit on the part of the plaintiff of his calling, whether it be of labor or of business. (Mass.) *Pickett v. Walsh*, 272.

8. **PRACTICE—Unincorporated Labor Union.**—An unincorporated labor union cannot be made a party defendant. (Mass.) *Pickett v. Walsh*, 272.

### TREATIES.

1. **TREATIES—Construction.**—If treaty rights are conferred of a nature to be enforced in a court of justice, the court resorts to the treaty for the rule of decision as it would to a legislative enactment. (Pa.) *Maiorano v. Baltimore etc. R. R. Co.*, 778.

2. **TREATIES—Construction.**—In construing a treaty the general rule obtains that the court is to be guided by the intention of the parties, and if the words clearly express the meaning and intention, no other means of interpretation can be employed. (Pa.) *Maiorano v. Baltimore etc. R. R. Co.*, 778.

3. **TREATIES—Rights Under—Who Entitled to.**—The provision in the treaty between the United States and Italy stipulating that citizens of that country while in the United States shall enjoy, in the protection and security of their persons and property, the same rights which the citizens of the United States enjoy, applies only to such citizens of Italy with respect to their persons or property as are within the jurisdiction of the United States. (Pa.) *Maiorano v. Baltimore etc. R. R. Co.*, 778.

See Death.

### TRESPASS.

See Animals.

### TRIAL.

#### *In General.*

1. **PRACTICE.**—The Defense that the Plaintiffs Have not Legal Capacity to Sue cannot be made out by showing that they have not sufficient facts to rest upon. (N. Y.) *Ullman v. Cameron*, 553.

**2. PRACTICE—Judgment Notwithstanding Verdict.**—If the findings of a special verdict in connection with the undisputed evidence will not sustain a judgment for the plaintiff, it is immaterial in rendering judgment for the defendant whether the verdict is set aside, or the answers therein changed. (Wis.) *Woodard v. German-American Ins. Co.*, 17.

**3. PRACTICE.**—Unfair Argument of Counsel to the jury is ground for setting aside the verdict. (Mich.) *Detroit Nat. Bank v. Union Trust Co.*, 319.

**4. JURY TRIAL, Taking Exhibits to the Jury-room Without the Consent of the Defendant.**—The fact that the jurors, without the consent of the defendant, took to the jury-room certain exhibits which had been received in evidence and examined by them during the trial, does not entitle the defendant to a new trial, where it does not appear what use was made of the exhibits while in such room. (N. Y.) *People v. Dolan*, 521.

#### *Instructions.*

**5. TRIAL—Instructions.**—An instruction which, after defining two methods of impeaching a witness, proceeds by stating that "if the jury believe that any witness for the defense has been successfully impeached by either of the methods aforesaid, then you are at liberty to disregard the evidence of such witness, except so far, if at all, as he may have been corroborated," is erroneous, and misleading in singling out a witness for the defense. (Ill.) *Godair v. Ham Nat. Bank*, 172.

**6. TRIAL—Instructions.**—The fact that matters of evidence and other unnecessary allegations are set out in the complaint does not justify the court in instructing the jury that such allegations must be proved, especially when they are immaterial. (Ark.) *Strange v. Bodcaw Lumber Co.*, 92.

**7. TRIAL—Omissions to Charge on Evidence.**—If the court in its charge to the jury in reviewing the evidence omits or insufficiently refers to portions that counsel think material, it is the duty of the latter to call the court's attention to them before the case goes to the jury, so that the error, if there is one, may be corrected before it has done any harm. (Pa.) *Commonwealth v. Minney*, 763.

See Continuance; Criminal Law; Dismissal and Nonsuit; Jury.

#### TRUSTS.

**1. If A TRUST is Invalid as to Creditors of the Beneficiary,** title to the property vests in him so far as the claim of such creditors are concerned. (N. Y.) *Ullman v. Cameron*, 553.

**2. TRUST, When Invalid as Against Creditors—Attempt to Exempt Property from Execution.**—A will giving all the property of the testatrix to a trustee, to be held by him for the purpose of paying over annually to her husband all of the income thereof necessary for his support and maintenance during his life, and whenever he should wish to engage in any business, to pay over to him so much of the principal as he may desire, and after his death giving the residue to certain other persons, is an attempt to create a trust in fraud of, and therefore void as against, his creditors, and for their benefit the title should be declared to be vested in their debtor and subject to the suit of his judgment creditors. (N. Y.) *Ullman v. Cameron*, 553.

3. **TRUST, When not Created by a Devise to the Testator's Wife for the Purpose of Maintaining Herself and Their Children.**—A devise and bequest to the testator's wife of his real and personal estate "for the purpose of maintaining herself and our children, to her and her heirs forever," creates an estate in fee in her when she becomes his widow and no trust in favor of the children. (Mass.) *Pitts v. Milton*, 223.

4. **TRUST, When Created by Will.**—Though a will does not purport to create a trust nor to devise property to a trustee, nor show that such property is to be managed by persons designated as trustees, yet a trust is created if the duties imposed on such persons are those of trustees. (N. Y.) *Mee v. Gordon*, 613.

5. **TRUST Against Assets in the Hands of an Administrator, When may be Established.**—If the proceeds of trust property can be traced into a particular fund, the trust may be established and enforced as a charge upon the fund. (Mass.) *Lowe v. Jones*, 225.

6. **TRUST Against General Assets in the Hands of an Administrator When cannot be Established.**—A trust cannot be established against the proceeds of trust property wrongfully disposed of by the trustee on the ground that the proceeds of the trust property went into the general assets and thereby increased the amount in the hands of the administrator. (Mass.) *Lowe v. Jones*, 225.

7. **TRUST, Administrator of Deceased Trustee, When cannot be Compelled to Apply General Assets to Relieve Trust Property.**—If a trustee has wrongfully pledged trust property under such circumstances that it cannot be recovered from the pledgee, the administrator of the trustee cannot be compelled to use the general assets of the estate to exonerate such property from the liability for which it was pledged. (Mass.) *Lowe v. Jones*, 225.

8. **TRUST Against Proceeds of Trust Property, When cannot be Established.**—A trust cannot be established against the proceeds of trust property which has been disposed of unless the proceeds can be identified and traced into some particular fund or property. (Mass.) *Lowe v. Jones*, 225.

See Monopolies; Perpetuities.

#### UNDUE INFLUENCE.

See Gifts; Wills.

#### USURY.

See Building and Loan Associations.

#### VENDOR AND VENDEE.

**EARNEST MONEY**—When may be Recovered.—If a contract to convey land is unenforceable, and the vendor refuses to convey, the earnest money paid under such contract may be recovered. (Minn.) *Larson v. O'Hara*, 342.

#### WARRANTY.

See Sales.

#### Note.

**Ways**, ejectment to recover, 579, 588.

**Wharves and Piers**, ejectment to recover, 579.

## WILLS.

*Construction.*

1. **WILLS**.—In the Construction of Wills the object is not to seek flaws and declare them invalid, but to sustain them if legally possible. (N. Y.) *Mee v. Gordon*, 613.

2. **WILLS**, Construction of—Trust, When Created as to Remainder. Under a devise and bequest of property to M., to be invested by the testatrix's executors for M.'s benefit during his natural life and for the benefit of his wife and issue after his death, a trust is not created as to the wife and children, but the title vests in them absolutely on M.'s death. (N. Y.) *Mee v. Gordon*, 613.

3. **WILL**, Devise in Fee, When Cut Down by Subsequent Words.—A devise and bequest in favor of a testatrix's brother and her nephew and niece, share and share alike, accompanied by a direction that the share of the brother be invested for his benefit during his natural life and for the benefit of his wife and his issue after his death, does not give the brother a fee in his share, but cuts his estate down to one for life. (N. Y.) *Mee v. Gordon*, 613.

4. **WILLS**—Perpetuities—Vested Interest, When will not be Devested.—An absolute bequest which has once vested in interest in the beneficiary will not be divested for the benefit of the testator's heirs merely because a subsequent limitation, which is intended to take effect neither as an executory devise or by reducing in the contingency named the absolute interest previously given, must fail of effect. (Mass.) *Gray v. Whittemore*, 246.

5. **WILLS**—If a Limitation Over is Void for Remoteness, it places all prior rights in the same situation as if the devise over had not been made. (Mass.) *Gray v. Whittemore*, 246.

6. **WILLS**, Constructing.—When the Language of the Testator is of Doubtful Import, Remainders will be Regarded as Vested unless a contrary intention is to be gathered from the provisions of the will. (Mass.) *Gray v. Whittemore*, 246.

7. **WILLS**, Heirs at Law, Who are.—A Trust or Bequest in Favor of the Heirs at Law of a Child of the Testator means those who would inherit his estate at the time of his death. (Mass.) *Gray v. Whittemore*, 246.

8. **WILLS**—Heirs at Law, Husband, When may Take as.—If, by statute, a husband surviving his wife who leaves no issue is entitled to take her real property up to a sum specified, he is entitled up to such amount to take property devised to his wife's heirs at law. (Mass.) *Gray v. Whittemore*, 246.

*Undue Influence.*

9. **WILLS**—Undue Influence—Directing Verdict.—Whether the court committed error in directing the jury to find for the proponent in a will contest does not involve any question as to the preponderance of the evidence or the credibility of the witnesses, or the force to be given to the evidence having a tendency merely to impeach the veracity of the witnesses, but only whether there was any evidence fairly tending to sustain the allegations of the bill with respect to undue influence and want of capacity in the testator as charged. (Ill.) *Cheney v. Goldy*, 145.

10. **WILLS**—Undue Influence—Directing Verdict.—The active agency of the beneficiary of a will in procuring it to be drawn, especially in the absence of those who have at least equal claims upon



the justice of the testator, and where the testator is enfeebled by old age and long-continued disease calculated to weaken his mental faculties, are circumstances indicating the probable exercise of undue influence, and in such case it is error for the court to peremptorily direct the jury to find a verdict for the proponents of the will. (Ill.) *Cheney v. Goldy*, 145.

11. **WILLS—Undue Influence.**—Proof of undue influence in the execution of a will which will invalidate it may be wholly circumstantial and inferential, and the influence may be that of a third person as well as of direct beneficiaries. (Ill.) *Cheney v. Goldy*, 145.

12. **WILLS—Undue Influence—Evidence.**—If a will disposing of the testator's property to strangers is sought to be set aside for undue influence or want of mental capacity, evidence tending to show that friendly relations existed between the deceased and some of his relatives is admissible. (Ill.) *Cheney v. Goldy*, 145.

13. **WILLS—Evidence to Show Undue Influence or Want of Testamentary Capacity.**—Declarations made at different periods of his life by a testator as to his views and intentions as to the disposition of his property may be introduced in evidence if consistent with the provisions of his will, but not to invalidate the will as having been made under undue influence. (Ill.) *Cheney v. Goldy*, 145.

See Perpetuities.

## WITNESSES.

### *In General.*

1. **WITNESSES—Compulsory Attendance.**—If an accused has made the required oath, he is entitled, as a matter of right, to summon witnesses beyond the statutory number allowed him. (La.) *State v. Freddy*, 195.

2. **WITNESSES—Power to Limit Number of.**—A rule of court arbitrarily limiting the number of witnesses on each side to four in a damage suit, upon the issue of damages or no damage, cannot be defended. It is both unreasonable and arbitrary. (Mo.) *St. Louis etc. R. R. Co. v. Aubuchon*, 499.

3. **CONSTITUTIONAL LAW—Witnesses of Tender Years.**—The statute authorizing the reception of unsworn testimony of children under twelve years of age is not in derogation of the constitutional right of the citizen. (N. Y.) *People v. Sexton*, 621.

4. **WITNESS—Testimony Against Deceased Person.**—In an action by a corporation against an executor or administrator, the general manager of the company is not disqualified to testify under the rule that a party shall not be allowed to testify, where the adverse party is an executor or administrator, of facts which occurred before the death of the decedent. (Ohio St.) *Cockley Milling Co. v. Bunn*, 741.

5. **WITNESSES—Part of Conversation.**—A witness may testify to a part of a conversation heard by him. (La.) *State v. Freddy*, 195.

### *Credibility of Witness.*

6. **EVIDENCE—Witnesses—Instruction to Disregard Evidence.**—It is reversible error for the court to instruct the jury in a criminal case that if they find that one of the witnesses has sworn falsely, then "such witness is not to be believed in any respect, and you have to disregard his testimony." (Pa.) *Commonwealth v. Ieradi*, 761.

**7. EVIDENCE—False Testimony.**—If a witness willfully and corruptly swears falsely to any material fact, the jury are at liberty to disregard the whole of his testimony, but the correct principle goes no further than this, and the jury should not be instructed that it must totally disregard his testimony. (Pa.) *Commonwealth v. Ieradi*, 761.

*Impeachment.*

**8. WITNESSES—Impeachment.**—A witness cannot be discredited simply on the ground of an erroneous statement. It is only where his statements are willfully and corruptly false in regard to material facts that his entire testimony may be discredited. (Ill.) *Godair v. Ham Nat. Bank*, 172.

**9. WITNESSES—Impeachment.**—A witness who is contradicted upon a material matter by other witnesses, or who has made a contradictory statement out of court upon a material matter, is not necessarily impeached as to his entire testimony, unless his testimony as to such material matter was knowingly and willfully corrupt and false. (Ill.) *Godair v. Ham Nat. Bank*, 172.

**10. WITNESSES—Impeachment.**—Evidence is admissible tending to show that a witness has, on former occasions, made statements contradictory to and inconsistent with his testimony given at the trial, which statements he has denied making, his attention on cross-examination having first been specifically invited to the time, place and circumstance of each conversation in which it is claimed such statements were made. Such testimony is admissible for the purpose of impeaching such witness. (Utah) *Larkin v. Saltair Beach Co.*, 818.

*Cross-examination and Leading Questions.*

**11. CRIMINAL TRIAL, Cross-examination of and Leading Questions to the Prosecution's Own Witness.**—The prosecuting attorney may cross-examine his own witnesses and ply them with leading questions, where they, being relatives of the accused, prove hostile and unwilling. (N. Y.) *People v. Sexton*, 621.

**12. WITNESSES—Cross-examination.**—If, in an action against the keeper of a bathing resort to recover for the wrongful death of a bather therein, a witness testifies on direct examination, that he is and for many years has been, familiar with such bathing resort, that he had been there hundreds of times in storms, that he had some experience, that he had not seen much danger and did not know that the bathing resort was very perilous, the opposing party is entitled to cross-examine him fully with reference to his prior statements and acts tending to show that to his certain knowledge such bathing resort was dangerous. (Utah) *Larkin v. Saltair Beach Co.*, 818.

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